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IN THE

Supreme Court of the United States

October Term, 1983

HAYFIELD NORTHERN RAILROAD COMPANY. INC.,

Appellant,

and

STATE OF MINNESOTA,

Appellant/Intervenor,

v.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY,

Appellee.

On Appeal From the United States Court of Appeals for the Eighth Circuit

JOINT LODGING

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SERVICE DATE
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INTERSTATE COMMERCE COMMISSION

DECISION

No. AB-1 (Sub-No. 113)F

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY--ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: July 10, 1981

The Chicago and North Western Transportation Company (applicant or CNW), a common carrier by railroad subject to the provisions of the Interstate Commerce Act, by application filed January 30, 1981, pursuant to section 10903 et seq. of the act, seeks a certificate of public convenience and necessity permitting the abandonment by CNW of a line of railroad extending 144.8 miles between Oelwein, IA on the south, and Randolph, MN on the north. The line proposed to be abandoned (the Line) has appeared at least since May 1980 in CNW's system diagram map as required under the Commission's Regulations Governing the Abandonment of Railroad Lines and Discontinuance of Service, 49 C.F.R. Part 1121, designated as category 1, color-coded red, i.e., a line which the carrier anticipates will be the subject of an abandonment application to be filed within the ensuing 3-year period. Public notice of the proposed abandonment was duly served, posted and published by applicant as required by law. An environmental assessment was made by the Energy and Environment Branch of the Commission's Office of Policy and Analysis which concluded that, with certain reservations, abandonment of the Line will not cause significant adverse energy consumption or environmental impacts. Numerous protests to the proposed abandonment were filed with the Commission, and by order served March 16, 1981, the Commission instituted an investigation and assigned the matter for public hearing before the undersigned Administrative Law Judge.

Hearings in this proceeding were held at Oelwein on and between May 5 and May 8, 1981. The abandonment is opposed by the Iowa Department of Transportation (IDOT) and by various shippers and shipper associations. Statements opposing the proposed abandonment made by several congressional representatives from the affected area in Iowa were read into the record. Briefs have been filed by the parties and have been considered.

Appendix A to this decision is a straight-line representation of the Line showing, among other things, intersecting rail lines and alternate rail lines used or intended to be used by CNW for the movement of bridge or overhead traffic now moving or formerly moved on the Line.

Applicant operates a network of railroad lines in 11 midwestern States including, as here pertinent, Iowa and Minnesota, which, together with Missouri, comprises applicant's Central Division. The Line traverses Fayette, Bremer, Chickasaw, Howard and Mitchell Counties in Iowa, and Mower, Dodge, Goodhue, Rice and Dakota Counties in Minnesota, a total of 65.2 miles in Iowa and 79.6 miles in Minnesota. The abandonment proposal extends from railroad milepost 354.3 just north of Oelwein to milepost 457.2 south of Dodge Center,

MN, from milepost 459.0 north of Dodge Center to milepost 496.9 near Randolph, and from milepost 1.2 at Hayfield, MN to milepost 5.2 at Waltham, MN. Excluded from the abandonment proposal, as seen, are 1.8 miles of CNW's line at Dodge Center. Identified below are the affected stations on the Line, their milepost locations, and the approximate populations residing thereat:

Stations	Mileposts	Populations
Westgate, IA	358.1	214
Sumner, IA	365.8	2,170
Fredericksburg, IA	375.7	912
New Hampton, IA	384.6	3,621
Alta Vista, IA	395.5	283
Elma, IA	398.9	601
Riceville, IA	409.3	877
McIntire, IA	414.9	234
Elkton, MN	431.5	134
Sargeant, MN	442.5	85
Waltham, MN	5.2	189
Hayfield, MN	448.9	937
West Concord, MN	467.4	718
Kenyon, MN	476.8	1,575
Nerstrand, MN	483.3	231
Dennison, MN	488.6	203

The Line was formerly a main line of the Chicago Great Western Railway Company and was acquired by applicant's predecessor, the Chicago and North Western Railway Company, pursuant to a merger approved by the Commission in 1968. Although the Line is identified as "Main Line Corridor" in a 1973 agreement CNW maintains with employee unions covering crew consists, it now serves basically as a way-freight branch line according to the manager, until February 1, 1981, of CNW's Central Division. The condition of the Line ranges from poor to fair to good, and more than 50 percent of the mileage on the Line is restricted to a speed of 10 miles per hour. The rail in the Line is 50 percent 115-pound, 45 percent 90-pound, 3 percent 112-pound and 2 percent 100-pound. About 95 percent of the main track rail is considered reusable if removed. Ties on the Line are in poor to good condition, with about 223,500 ties considered usable elsewhere if removed. The ballast on the Line is mostly slag, with a number of miles of rock, gravel and chats in generally fair condition. Maximum grades are 1.02 percent northbound and 0.99 percent southbound, and there are 107 curves with a maximum curvature of 4 degrees 30 minutes. There are 5 overhead highway bridges and 1 overhead railroad bridge on the Line, and 201 spans of pile bridge, 35 steel spans and 309 culverts. There are 177 public and 89 private main track road crossings at grade, of which 36 crossings have automatic protection. About 76 percent of the right-of-way is fenced, with fences in generally fair condition. There are various buildings at six points in Iowa and four points in Minnesota, consisting of depots, sheds, tool-houses, and the like.

Train service on the Line is presently provided by a 5-day way-freight assignment as follows: Oelwein to New Hampton on Mondays, New Hampton to Dodge Center on Tuesdays, Dodge Center to New Hampton on Wednesdays, New Hampton to Oelwein on Thursdays, and Oelwein to New Hampton and return on Fridays. Waltham is apparently served once a week, either on Tuesday or Wednesday. This train does not now serve the Line north of Dodge Center, service to this area being provided, usually once a week, by CNW's Twin Cities Division on its South St. Paul-Randolph wayfreight train. Until December 1, 1980, the Oelwein-Dodge Center train also served the Line north to Randolph, and prior to June 10, 1980, service on the Line was provided by through trains operated between St. Paul, MN and Oelwein, with a crew change at

Randolph. Service on the Line has varied from time to time, it appears. For example, Exhibit F to the application, an analysis of train service on the Line, shows that during the second week of January 1978, the train ran from Dodge Center to Oelwein on Monday, from Oelwein to Dodge Center on Tuesday, from Dodge Center via Waltham to Oelwein on Wednesday, from Oelwein to New Hampton and return on Thursday, from Oelwein to Dodge Center on Friday, and from Dodge Center to New Hampton and return on Saturday. The Exhibit also shows that during the third week of July 1980 the train ran from Dodge Center via Waltham to Oelwein on Monday, from Oelwein to Dodge Center on Tuesday, from Dodge Center to Randolph and return on Wednesday, from Dodge Center to Sumner on Thursday, and on Friday from Sumner to Oelwein and from Oelwein via Waltham to Elkton. The train completed 149 cycles in 1978, 150 cycles in 1979, and 87 cycles in the first seven months of 1980.

The products transported in greatest volume on the Line are corn, soybeans, fertilizers, food products and hazardous materials. Shown below are the number of cars and tons of carload freight originated and/or terminated on the Line, in total and for the principal commodities transported, during 1978, 1979, and the base year, 1/ the 12-month period ended July 31, 1980:

Commodities	1978		1979		Base Year	
	Cars	Tons	Cars	Tons	Cars	Tons
Corn	1,098	70,161	740	52,786	607	42,468
Soybeans	135	9,530	88	5,749	66	4,290
Food Products	214	12,281	291	15,689	292	15,417
Potash	386	38,054	449	44,454	518	51,389
Nitrogen Fertilizers	48	4,376	56	5,232	47	4,358
Phosphate Fertilizers	187	16,978	182	17,110	192	18,450
Other Fertilizers	15	949	26	1,505	24	1,339
Calcium Chloride	34	1,592	28	1,383	22	1,146
Plastic Products	31	1,853	28	2,110	31	2,479
Anhydrous Ammonia	37	2,683	16	1,096	15	1,163
Combustible Liquids	36	3,072	35	2,967	15	1,278
Corrosive Material	12	977	16	1,560	51	4,798
All Commodities	2,695	189,065	2,288	168,060	2,109	160,023

Applicant points out that traffic on the Line has been declining, and asserts that this decline has occurred even though the Line has been receiving its equitable share of available cars for loading. Shippers at the southernmost station on the Line, Westgate, for example, ordered a total of 257 cars in 1978, and 206 cars were placed, about 80 percent of the cars ordered. At Riceville in 1979, 208 cars were ordered and 203 cars placed, or about 97 percent. In 1980 at McIntire 121 cars were ordered and about 61 percent, or 74 cars, were placed. At all stations on the Line, during the 6-month period April through September 1978, a total of 774 cars were ordered and 612 cars were placed, about 79 percent, and during a comparable period in 1980 a total of 295 cars were placed, or 59 percent of the 497 cars ordered. During the entire period April 1977 through December 1980 the percentage of cars placed to cars ordered ranged from 59 percent to 88 percent. Systemwide, on the other hand, the number of grain cars,

1/ The Commission's Abandonment Regulations define the base year as the latest 12-month period, ending no later than six months prior to the filing of the abandonment application, for which data has been collected at the branch level as prescribed in section 1121.40(b) of the Regulations. The latter section prescribed that the collection and compilation of such data shall be in accordance with the Branch Line Accounting System (49 CFR 1201) established pursuant to section 205(e)(1)(a) of the Regional Rail Reorganization Act of 1973, as amended.

boxes and covered hoppers, ordered on the first day of each month in 1979 totaled more than 19,000 cars, and only about 18 percent of the cars were placed. In 1978 that percentage was less than 15 percent.

The decline in grain and soybean traffic is attributed by applicant to the transportation and marketing alternative provided by the close-by Mississippi River barge facilities and to the availability of nearby processors at Cedar Rapids and Clinton, IA. According to applicant, moreover, the Line plays an "insignificant" part in the marketing of the grain produced in the area. Based on Iowa and Minnesota agricultural statistics, applicant estimates that the Iowa counties traversed by the Line produced about 78.2 million bushels of corn in 1979, and three of the five counties in Minnesota traversed by the Line produced in that year about 41.6 million bushels. On the Line in that year, on the other hand, CNW transported only a little more than 1.5 percent of the corn produced in the area, and less than one percent of the soybeans. Similarly, of the 942,000 tons of fertilizer materials consumed by farmers located within a 25-mile radius of the Line in 1979, according to applicant, only a little under 70,000 tons was terminated on the Line, about 7 percent of the volume consumed. With regard to the transportation of these products, and others, it is applicant's position that the Line is used by shippers as stand-by transportation, that alternate modes of transportation and marketing options are readily available to shippers and consumers, and that with some shifting of suppliers and markets and some revision of ordering practices and shipping patterns abandonment of the Line will have minimal impact on the economy of the area.

Applicant has been having some operating difficulties on the Line. A substantial portion of the Line, as stated, is limited to a speed of 10 miles per hour, and only on about 20 miles of the Line are trains permitted to operate at the maximum timetable speed of 40 miles per hour. Much of the track is said to be rough, with bad cross level, and portions of the Line cannot be surfaced without installing ties and ballast. Line deterioration and excessive slow orders have from time to time necessitated embargoes of hazardout materials to or from particular stations, and it is not uncommon, particularly during cold weather, to have 15 broken rails a day reported in the 90-pound rail. Snow clearance problems occur, primarily in the rugged terrain between Dodge Center and Randolph, and many derailments have been caused by cross level variations in the Line where slow orders are in effect. The slow orders have also made it increasingly difficult to operate trains on the Line without relieving crews en route to comply with the Hours of Service Law. During cold weather particularly, when only about half the trains are able to make the complete run in compliance with hours of service, added expense is incurred in transporting relief crews for smaller as well as for larger trains, despite adequate diesel units, mostly 1,500 horsepower, 4 axle, GP-7 class units.

The primary impetus for the proposed abandonment is financial. Applicant alleges that operation of the Line exerts a financial drain on the railroad, and that continued operation will constitute an undue burden on interstate commerce. Exclusive of overhead traffic considerations or opportunity costs, the avoidable loss from operation of the Line is computed by applicant as $326,850 for 1978, $303,234 for 1979, $135,491 for the first 7 months of 1980, and $174,266 for the base year. Appendix B is a table prepared by applicant as required under section 1121.41 et seq. of the Abandonment Regulations, showing revenues and costs associated with the operation of the Line for 1978, 1979, the first 7 months of 1980, and the base year, and also for an estimated subsidy year as required under section 10905 of the act. This table, as seen, takes no cognizance of overhead traffic revenues or costs. Prior to filing the application, CNW had requested a waiver of filing requirements concerning overhead traffic, revenues and

costs, on the ground that CNW does not intend using the Line to transport overhead traffic in the future, regardless of the outcome of this proceeding, that such traffic will be retained by CNW over another line in its system, and that data associated with overhead traffic will not be relevant in determining the burden upon applicant from continued operation of the Line. By order served February 27, 1981, the Commission granted the waiver. The Commission made it clear, however, by a later order served April 9, 1981, in which it denied IDOT's petition for reconsideration of the waiver, that the waiver was without prejudice to demonstration by protestants during the course of the proceeding that overhead traffic data is relevant and that the record should be supplemented accordingly. In the meantime, by use of interrogatories, IDOT attempted to obtain overhead traffic data from CNW, without success. Subsequently, on IDOT's motion, by an order served April 10, 1981, the Judge directed CNW to divulge that information, and ultimately, as later discussed, data relating to overhead traffic on the Line, and corresponding revenues and costs, were made a part of the record.

The amounts shown in Appendix B were computed by applicant in the manner prescribed in the Abandonment Regulations. As seen, lines 2, 5(f), and 6(b) relate to overhead traffic, and are left blank by applicant because of the waiver. Lines 9 and 13(b) are also blank. The latter represents income tax benefits from the abandonment; none, since applicant is not in a tax-paying position, and the former reflects rehabilitation expenditures to bring the Line into compliance with FRA Class 1 safety standards; none, since the Line is now in compliance with those standards. Line 1 represents total system revenue earned by CNW on traffic originating or terminating on the Line, without prorate, including CNW's division of revenues on traffic interlined with connecting carriers. Line 3 represents revenues from such services as demurrage, switching, leasing of land or track facilities, and the like. Lines 5(a) through 5(j) represent the various on-branch costs incurred in operating the Line, and 6(a) the off-branch costs related to traffic originating or terminating on the Line, computed by use of the Rail Form A costing method. Line 8(b) represents opportunity costs incurred by CNW as a result of not being able to better utilize the assets embodied in the Line, those initially invested as well as those infused to operate the Line. This amount is computed by multiplying CNW's cost of capital by the sum of its avoidable losses, its working capital, and its net liquidation value. Line 10 represents administrative costs which would be incurred by CNW if the Line were subsidized, computed as one percent of the total annual revenues attributable to the Line in an estimated subsidy year. Line 11 represents the cost of obtaining insurance for CNW's uninsured liability and to establish a reserve for any deductible amounts under such policy, and is blank because applicant is unable to estimate such a cost until an appropriate subsidy agreement is executed. Line 13 represents return on value of rail properties, computed as prescribed in Part 1121.44. Working capital is 15/365 of on-Line avoidable costs less depreciation, and net liquidation value is the amount computed by CNW's engineering witness, later discussed. Line 14, the rate of return applied to the valuation of property, 16.979 percent, is represented to be CNW's cost of capital for road property, that is, the average total annual return of its mortgage bonds and stocks, $14.3 million, divided by the average market value of its mortgage bonds and stocks, $84.5 million. Line 15 represents the economic cost to CNW of operating the Line, and Line 16 represents the estimated subsidy cost.

As noted, the estimated net liquidation value of the Line was developed by CNW's engineering witness, Reid, a consultant who for almost 40 years had served in various capacities in CNW's engineering department. Reid's analysis appears as Appendix C, showing a total estimated net liquidation value for the Line of $12,985,885.

Reflected therein is a valuation of $1.7 million, or about $827 per acre, for the 2,100 acres of land in the Line, representing its sale value if disassembled and sold in separate parcels. The land was evaluated by CNW's real estate manager, and reflects a discount of 40 percent to allow for shape, topography, location and quality of title. In the latter regard, about 90 percent of the land in the Line was acquired by warranty deed. Land acquired by right-of-way deed, condemnation or easement was excluded from the valuation. The valuations for all scrap items shown in Appendix C are based on current prices received by CNW for scrap of like kind over a 6-month period. Usable bridge timber and switch ties are valued at 50 percent of current new price, and usable bridge steel is valued at 60 percent of new. Usable cross ties are valued at the average price paid by CNW for usable ties in 1979. Usable rail is valued at 70 percent of current new price. In the latter regard, current new price is the market price in late 1980, and the percentage applied, usable 70 percent of new, was established several years ago by CNW based on many factors. It may be noted, also, that although a section of 115-pound rail is more expensive than, for example, a section of 90-pound rail, all weights of rail are valued uniformly per net ton of usable rail. Other track material, usable, is valued at 75 percent of new, as are signal equipment, a hot box detector, and buildings. The estimated costs for removing bridges, tracks, signals, communications systems, and buildings, and to restore grade crossings are based on CNW's experience over the last decade in removing more than 2,500 miles of track.

CNW's engineering witness, Reid, also calculated the avoidable costs of maintaining ways and structures on the Line as shown in Appendix B, including estimated costs for the subsidy year to maintain tracks, bridges and other facilities to comply with Federal Railroad Administration track safety standards for Class 1 track, as set forth in line 5(a) in the final column. The latter amount, $741,585 or $5,079 per mile, contrasts sharply with applicant's system average cost for maintenance of ways and structures, $15,231 per mile annually in 1978-79, and with the average annual expenditure on the Line during those years as developed from CNW payroll and material charge-out records, $2,969 per mile. In the latter regard, some of the costs projected for the subsidy year are well above corresponding actual expenditures on the Line. For example, the costs projected for ties, running, $159,280, contrasts with $2,148 expended in 1979 and $625 during the base year, and the projection for rail, running, is $4,935, as compared with $252 in 1979 and $1,112 in the base year. An even sharper contrast is provided by ballast, running, $509 during the base year projected at $19,185, and roadway machines, projected at $75,174 as compared with zero expenditure during the base year. Applicant defines the projected annual maintenance cost, $741,585, as the average annual cost of maintaining the Line in Class I condition over an extended period of time, a 40 to 50 year period. Applicant acknowledges that maintenance expenditures presently and in recent years have been far below projected costs, and reflect CNW's policy of maintaining its lines in a safe condition while keeping its operating losses at a minimum on marginal lines. Under this policy the Line "was allowed to deteriorate from Class II or better to basically FRA Class I (10 m.p.h.)."

The deteriorated condition of the Line was a fetor considered by CNW's management when the decision was made in June 1980 to divert overhead traffic from the Line. According to CNW's Vice President, Transportation, Burkhardt, an intensive inspection of the Line by IDOT had disclosed a number of violations and deviations from FRA track standards, and the railroad was faced with the prospect of making substantial expenditures to correct the condition of the Line. The Line was corrected to Class I standards at minimal cost, but to upgrade the Line to Class II or Class III standards, considered necessary for effective overhead operations, would have cost "millions of dollars,"

according to Burkhardt. Since 1974, also, when for the first time the Oelwein-Randolph line and CNW's somewhat parallel Marshalltown-Mason City line came under the jurisdiction of the same division, CNW's management had become increasingly aware of the economies possible in consolidating over one line the traffic moving over both lines at less than capacity. At division level at least, a management decision was made to upgrade the Marshalltown-Mason City line and to relegate maintenance on the Oelwein-Randolph line to a lower priority. Applicant is also leasing, and in a pending proceeding seeks authority to purchase, some 800 or more miles of line of the bankrupt Rock Island Railroad, including a 500-mile main line between St. Paul, MN and Des Moines, IA which roughly parallels the Oelwein-Randolph line. At the present time, according to Burkhardt, overhead traffic formerly moving over the line is being routed over the Rock Island leased line, the Marshalltown-Mason City line, a CNW main line between Minneapolis, MN and Chicago, IL via Wisconsin, and a CNW line between Minneapolis and Council Bluffs, IA via Sioux City, IA. Speaking for CNW management, Burkhardt stated flatly that as a matter of managerial discretion CNW will no longer route overhead traffic over the Line, regardless of the outcome of the instant proceeding. Burkhardt was candid in stating that this decision, made in June 1980, as stated, and largely his, was made in contemplation of this proposed abandonment.

As previously indicated, some difficulty was encountered in obtaining for this record data relating to the volume, and corresponding revenues and costs, of the overhead traffic handled on the Line during the time periods for which applicant is required to file traffic and financial data in this abandonment proceeding. Data relating to overhead traffic is not ordinarily separated out as to a particular line by CNW, and, as noted, applicant had been granted a waiver prior to filing the application. The time frame available for gathering this data once the Judge had ordered its production was brief, and a vast number of records had to be examined to isolate this data. CNW's computers are not set up to capture traffic that specifically moves over a particular line, so CNW fed into the computer data for all overhead traffic that moved between Oelwein and Randolph, between Oelwein and Dodge Center, and between Dodge Center and Randolph, and developed an estimated summary of overhead traffic that might have moved on the Line, estimated because without individual examination of car records it cannot be ascertained whether these cars actually moved over the Line and not over other alternate lines. By stipulation of the parties, in recognition of the exigencies of the brief time span available for compilation of this data, the results of these computer runs were accepted as showing the overhead traffic on the Line moved during 1978, 1979, and the first seven months of 1980. Using the revenue data developed in these computer runs, CNW's Director of Special Studies, Brauner, computed overhead costs on the Line to derive the net operating results attributable to overhead traffic as follows:

	1978	1979	1980 (7 months)
(A)			
Revenues	$6,280,277	$7,263,710	$4,282,578
Line Haul Expense:			
Car-Mile Costs	$2,555,967	$2,834,497	$1,410,141
Ton-Mile Costs	$1,128,002	$1,244,938	$ 650,088
Net Revenues	$2,596,308	$3,184,275	$2,222,349
(B)			
Revenues	$6,280,277	$7,263,710	$4,282,578
Line-Haul Expense:			
Car-Mile Costs	$2,296,184	$2,507,948	$1,226,260
Ton-Mile Costs	$1,122,656	$1,237,025	$ 647,675
Net Revenues	$2,861,437	$3,518,737	$2,408,643

(A) = Based on replacement costs of cars.
(B) = Based on historical costs of cars.

As seen, two separate computations were made; the first is based on replacement costs of the cars that might have moved on the Line and assumes that all of the cars were CNW-owned cars, and the second is based on the historical value of the cars and assumes that all of the cars were foreign-owned cars. Inasmuch as the CNW witness did not examine the individual overhead movements he could not testify as to whether or to what extent the movements were in CNW or foreign cars. Given the stipulated methodology, however, the actual net revenues from overhead traffic during the stated periods, in his opinion, would be "somewhere in between" the A and B totals shown above. Because of the limited time available to make the computations, Brauner used Rail Form A costs, basically average costs, but had there been sufficient time he would have calculated actual costs, and in lieu of the computer runs previously described would have calculated revenues from wheel reports, actual car records and waybills to determine actual revenues allocable to the Line.

Throughout this proceeding applicant has adhered to its position, previously stated, that overhead traffic data is not relevant to this investigation because such traffic has been diverted from the Line and because revenues from such traffic will be retained by the carrier over other lines of CNW. As seen in the table above, CNW's revenues from overhead traffic handled on the Line were substantial during the periods indicated. On an annual basis, prior to June 1980, CNW handled about 35,000 carloads a year of overhead traffic on the Line. Despite the management decision in June 1980 to divert overhead traffic from the Line, such traffic has continued to move over the Line in some volume. Between June 1980 and May 1981 a total of 69 trains moved on the Line hauling overhead traffic. Of these, 13 were trainloads of potash moving south on the Line from Canadian origins, a total of 948 cars aggregating more than 123,000 tons. Eight of the trains moving north on the Line were made up entirely of empty cars from the potash trains, an aggregate of almost 600 empty cars. All of this potash was destined to Waterloo, IA. Additionally, some 22 trains moved southbound on the Line and 26 trains moved northbound, all hauling other commodities in overhead traffic. The bulk of this movement occurred in November 1980, when CNW's leased Rock Island line, previously mentioned, was undergoing repairs. These 48 trains were comprised of 1,799 loaded cars and 2,207 empties, an aggregate of almost 223,000 tons. CNW regards this post-June 1980 overhead traffic on the Line as a series of irregular movements, handled on the Line as

as a matter of convenience. Overhead traffic in regular scheduled train service, applicant insists, was discontinued on the line in June 1980. In any event, CNW's chief operating officer on its Central Division, testifying in rebuttal, stated categorically that "We will not operate overhead traffic on this line."

It is applicant's position, as stated, that abandonment of the Line will have minimal effect on shippers and receivers located along the Line. In the application, as required, applicant described alternate sources of transportation, rail and motor carrier, available to these shippers and receivers. Applicant's witness at the hearing, Amburn, its district sales manager whose sales territory embraces the Line between Randolph and the Minnesota state line, attempted to amplify and supplement this data. It became apparent during the course of cross-examination that this witness had little or no personal knowledge with respect to the motor carriers operating in the involved area, particularly in Iowa, and was acting merely as a conduit of information derived by telephone or otherwise from others. On motion of protestants, Amburn's testimony was stricken. The state of the record is that there are many motor carriers operating in the area, but little or nothing is disclosed with regard to their operations, their available equipment, or the commodities they transport. To some extent, however, cross-examination of various shippers and receivers, protestants herein, disclosed relevant information pertaining to one or another of the various motor carriers operating in the area.

The act requires the Commission, in approving the abandonment of a line of railroad, to impose conditions for the protection of carrier employees. Early in the hearing applicant agreed to the imposition of labor protective conditions as set forth in Oregon Short Line Railroad Company, Abandonment--Goshen, 360 I.C.C. 91 (1979), sometimes referred to as the Oregon III conditions. These conditions have been found by the Commission in numerous proceedings to satisfy the statutory requirements, and are customarily imposed in abandonment proceedings. The legislative director of the United Transportation Union, appearing in this proceeding to represent carrier employees, stated on the record that imposition of the Oregon III would satisfy the interests of the employees.

The proposed abandonment is opposed by IDOT, specifically, that portion of the Line located in Iowa between Oelwein and McIntire. IDOT is an agency of the State of Iowa responsible for the planning, development, regulation and improvement of transportation in that State, and it represents the State's interest in rail abandonment proceedings before this Commission. IDOT completed formulation of its "Iowa Rail Plan" in March 1978, during the course of which its inventory of the system of rail transportation in Iowa disclosed that "in Iowa we had too many miles of railroad," and that "Iowa has more rail lines than a healthy system can support." Accordingly, IDOT adjusted its former policy of arbitrarily opposing rail abandonments, and instead supports abandonment of those lines that are not essential to Iowa's rail system and opposes abandonment of only those lines which it economic analysis indicates are viable lines. Under this policy, out of the last twenty abandonments in Iowa IDOT has opposed only four. IDOT's primary tool in evaluating rail abandonments is the benefit/cost ratio, a numerical rating derived from dividing the quantifiable benefits to shippers and the public if the line is kept in service, by the cost to the railroad of upgrading and maintaining the line in service. The result of such a calculation determines for IDOT whether a particular rail line proposed for abandonment is viable and should be retained. In strict economic terms, according to IDOT's director, a benefit/cost ratio equal to or greater than 1.0 is indicative that the public interest is best served by preserving a particular rail line. However, IDOT's method of determining benefits assumes that shippers will choose their next best alternative for

transporting goods to market if rail service is lost. Consequently, IDOT considers that actual benefits accruing to shippers are usually greater than those computed in economic analyses because shippers lack the computer's "perfect" knowledge of available transportation alternatives and alternative markets. Therefore IDOT regards a benefit/cost ratio of 0.75 or greater as an indication that a line is viable or potentially viable for the shippers and for the public. For the Oelwein-McIntire segment of the Line IDOT calculates a benefit/cost ratio of 1.27, and alleges that, with aggressive marketing, improved efficiency of operation, and the possible imposition of surcharges, the Line (that portion in Iowa) can be operated profitably by CNW.

In order to calculate a benefit/cost ratio for the Line IDOT first gathered its basic data, i.e., commodities shipped, volumes of traffic shipped, etc., obtaining such data from the abandonment application and from survey questionnaires submitted by the shippers along the Line. An analysis was made, into which was factored rail user benefits and public benefits. Rail user benefits are defined as the total annual transportation and handling cost savings to grain shippers, fertilizer receivers, and other shippers and receivers on the Line if the Line is not abandoned. These include, among others, net additional trucking costs to or from alternate rail heads or markets, net changes in product handling or facility costs, and net changes in product values resulting from changed markets. Public benefits are defined as the added highway construction and maintenance costs incurred by local governments if a line is abandoned. Not taken into consideration in this instance were other public benefits, such as lost employment and income, environmental and safety impacts, due to the difficulty of quantifying their value. The costs factored into the benefit/cost ratio are the costs of rehabilitating the Line to a 263,000-pound carrying capacity at a minimum speed of 25 miles per hour (FRA Class II), a level considered by IDOT to be adequate to meet the needs of shippers on the Line, and the costs of maintaining the Line at that level. These costs were calculated, in current dollars, by first computing the gross cost of rehabilitation to FRA Class II and converting this to net value by subtracting the salvage value of the rail which would be replaced and adding the opportunity cost attributable to the railroad's inability to liquidate the entire Line at the current time. The net upgrading cost is annualized by capitalization over a 35-year period at a real capital cost equal to 7 percent per year, and the annualized salvage value of the upgraded Line at the end of its useful life is subtracted therefrom, assuming again a 35-year life and 7 percent capitalization rate. Finally, the annual normalized maintenance cost is added. IDOT estimated a cost of more than $5 million to upgrade the Iowa portion of the Line to FRA Class II, and capitalizaing the upgrading cost over 35 years and adding an annual track maintenance allowance yielded a yearly cost of $796,000 to keep some 66.1 miles of Iowa line in service. The corresponding rail user and public benefits came to $1.013 million, and the resulting benefit/cost ratio calculates, as stated, to 1.27. This ratio assumes that the Line is upgraded and that traffic increases as a result. On a "worst case" basis, assuming upgrading but no increase in traffic, the benefit/cost ratio would be 0.80, and it would be 1.87 assuming no upgrading and no increase in traffic. None of these calculations gave consideration to overhead traffic.

IDOT also offered the testimony of Johnson, an experienced railroad engineer, who had inspected the Line between Oelwein and the Minnesota State line. Johnson concurred generally with Reid's evaluation of the condition of the Line and his estimated maintenance costs, but differed on net liquidation value. Based on his own experience and discussions with vendors, Johnson estimated a price of $275 per ton for 115-pound rail, $270 per ton for 112-pound rail, $235 for 100-pound rail, and $225 for 90-pound rail. Based on these unit prices Johnson adjusted downward the net liquidation value by more than $2 million. An additional downward adjustment of $113,200, the

net salvage value of some 12 miles of sidetrack, was made to reflect the witness' opinion that these unused tracks could be removed without abandonment and without affecting the operation of the Line. Johnson thus estimates a liquidation value for the entire Line of $10,813,585, and based on the same valuations a net liquidation value of $2,161,544 for the segment between Oelwein and New Hampton and $1,903,325 between New Hampton and McIntire, or $4,064,869 for the Iowa portion of the Line.

A research engineer, McEwen, employed by one of the largest contracting and engineering firms in the country, testified for IDOT. McEwen was critical of applicant's computation of its cost of capital, its rate of return, and its opportunity costs. According to McEwen, CNW selectively excluded major segments of its capital structure in computing its cost of capital and its debt/equity ratio, failing to consider such items as equipment trusts, sinking fund bonds, income bonds, debentures, bank and government loans, and preferred stock. Using what he calculated as CNW's actual cost of capital, 9.02 percent, and CNW's actual debt/equity ratio, 91 percent debt to 9 percent equity, McEwen calculated CNW's cost of new capital to be 12.1 percent, and adjusted this by an anticipated future inflation factor of 9.7 percent to reach a 2.4 percent cost of capital. Based on the net liquidation value of the Line as computed by Johnson, $10,813,585, McEwen found that an adequate rate of return for CNW fell between 2.4 percent and -0.68 percent. The latter figure is predicated on a 91/9 percent debt/equity ratio and corresponding interest rates of 7.83 and 21.05 percent weighted to an average of 7.13 and 1.89 percent, and the result reduced by a future inflation factor of 9.7 percent. On this basis, and exclusive of overhead revenues, McEwen concluded that CNW's opportunity costs ranged between $73,908 and $260,853 for the subsidy year.

Another engineer, Ekegren, employed by the same company, testifying for IDOT, evaluated the segments of the Line in Iowa, Oelwein to McIntire and Oelwein to New Hampton, to determine their profitability. For this purpose, Ekegren designed an operating plan for each segment which assumed Oelwein to be the starting point and that all cars would enter and leave the Line at Oelwein. Train operation schedules were based on CNW's 1980 conductor work reports to determine average running time between stations and average switching time. Both plans assumed twice a week service, or two round trips a week. The entire Iowa segment, Oelwein to McIntire, was calculated to be 67 miles in length, and based on actual running and switching times in late 1980 was determined to require 16.5 hours for a complete round trip. According to Ekegren, this segment accounts for 75 percent of the traffic originating or terminating on the Oelwein-Randolph Line. The operating plan, Oelwein to New Hampton, 32 miles, required 9 hours for a round trip. This segment accounts for 51 percent of the Oelwein-Randolph traffic. Except for administrative expense, which was estimated by Ekegren, and net liquidation value and rate of return, which were based, respectively, on Johnson and McEwen's calculations, Ekegren's computations were based on CNW's data, prorated as appropriate based on miles or carloads, or were recomputed from CNW source data. Exclusive of opportunity costs or overhead traffic, Ekegren concluded that Oelwein-New Hampton operations would yield a profit of $27,613 over the subsidy year, and that Oelwein-McIntire operations would incur an avoidable loss of $94,941. IDOT emphasizes that these results are based on historical traffic data only and do not reflect shipper projections of potential traffic or overhead traffic. Ekegren also recalculated revenues and costs on the entire Line, Oelwein to Randolph, for 1978, 1979, and the first 7 months of 1980, including opportunity costs as computed by applicant but factoring in overhead revenues and costs as accepted in this record. The results reached by Ekegren was a profit of $1.6 million for 1978, $2.3 million for 1979, and $1.7 million for seven months 1980.

The proposed abandonment, in its entirety, is opposed by the Northeast Iowa Transportation Association (NEITA), an informal association of shippers and receivers located at various points in Iowa along the line.2/ Witnesses for 18 of NEITA's member firms testified in opposition to the proposed abandonment. Appendix D hereto is a synopsis of the evidence offered by NEITA's witnesses. NEITA emphasizes that Iowa shippers originated and terminated the great bulk of the traffic moving on the Line. In the 2-year, 7-month period, 1978 through July 1980, for example, Iowa shippers were responsible for more than 77 percent of all traffic moving on the Line, exclusive of overhead, including more than 50 percent of all fertilizers received on the Line and almost 87 percent of all grain originated. NEITA points out that CNW's marketing manager, grain and grain products, acknowledged in his testimony that grain elevators which have, and use, rail service can receive, on the average, from 4¢ to 7¢ extra per bushel of grain, and can pass this price advantage along to farmers. On the basis of 6¢ per bushel for the actual number of bushels shipped in 1980 by seven NEITA members, NEITA alleges that these shippers would incur additional annual costs of more than $111,000 if they are deprived of rail service, and that northeast Iowa farmers generally would receive less for their grain in an annual amount ranging between $315,000 and $440,000. With regard to fertilizers received on the Line, NEITA notes that CNW's market manager, chemicals and fertilizers, testified that fertilizer receivers deprived of rail service could experience added trucking costs of up to $6 per ton. Using what it regards as a more realistic $8.40 per ton, NEITA alleges that, based on tons of dry fertilizer actually received in 1980, eleven receivers of fertilizer on the Line would have added transportation costs aggregating more than $342,000 per year if the Line is abandoned. In the aggregate, according to NEITA, its member firms would incur additional costs of more than $729,000 annually, if this Line is abandoned, and in the process of adjusting or rebuilding their facilities to ship or receive their goods without rail service these companies would incur one-time capital costs ranging between $766,000 and $800,000.

The proposed abandonment is opposed, also, by a group of shipers and receivers located in Minnesota, referred to collectively herein as MnShp,3/ and by the Hayfield Development Corporation (Hayfield), an entity formed to encourage and assist businesses to locate and expand in the Hayfield, MN area. These protestants oppose the abandonment only of about 19.2 miles of the Line, that is, between milepost 442 near Sargeant, MN and milepost 457.2 near Dodge Center, MN, and between milepost 1.2 near Hayfield, MN and milepost 5.2 near Waltham, MN. This segment of the Line (the Sargeant-Dodge segment) runs immediately south of CNW's east-west main line between Mankato, MN and Minnesota City, MN, which intersects the Line at Dodge Center. According to MnShp the Sargeant-Dodge segment is accessible from either the east or the west to trains operating on the intersecting main line. MnShp alleges that the Sargeant-Dodge segment is in good condition and, standing alone, a profitable line of railroad to be

2/ Andersen's Agricultural Center, Ltd.; C & H Farm Supply Co.; Custom Agricultural Center, Inc.; D & V Grain Handling; Farmers Butter & Dairy Co-op; Farmers Feed & Grain Co., Inc.; First Miss, Inc.; Fredericksburg Farmers Co-op; Hancor, Inc.; Hillandale Farms of Iowa; Howard County Equity; Kitchens of Sara Lee, Inc.; Maynard Cooperative; McIntire Feed & Grain, Inc.; Meinerz Creamery, Division of Beatrice Foods Co.; Midland Cooperative, Inc.; Overton Chemical Sales; Ralston Purina Co.; H. J. Schult and Son; Thermogas Company; Tolliver Farm Supply; Wayne's Ag., Inc.; and Westgate Elevator Co., Inc.

3/ Power Span, Inc.; Midland Cooperatives, Inc.; Brownsdale Cooperative Association; Reese Farm Center, Inc.; Mower County Service Company; Century Plastics, Inc.; Farmers Cooperative Oil Association; Hunting Elevator Company, Inc.; Hayfield Lumber Company; Nelson's Gas, Inc.; and Sargeant Grain Company.

increasingly profitable in the immediate and long-term future. MnShp takes the position that this segment is operationally feasible as a branch line or spur in connection with operations on the east-west main line at Dodge Center, and should not be abandoned. Hayfield joined MnShp in urging that this segment be retained in service. The economy in the Hayfield area has been expanding for several years, and Hayfield fears that abandonment of rail service to and from the area may cause new businessees to decide against locating in the area and thus adversely affect the area's growing economy.

The evidence of the shipper-receiver witnesses presented by MnShp is summarized in Appendix E. Additionally, MnShp presented several highway engineers employed by the Minnesota Department of Transportation and by Dodge and Mower Counties in support of its position that adequate alternate modes of transportation are not available to these Minnesota shippers. Their testimony, in substance, was to the effect that state and county highways in the proximity of the Line, in particular the Sargeant-Dodge segment, are subject to seasonal weight restrictions, and that funds for improvement of the highways are not available to Dodge and Mower Counties at this time. MnShp also offered the testimony of a consultant, Shaffer, who analyzed operations on the 19.2-mile segment for the base year and estimated operations for a pro forma year, utilizing in the latter regard the projections made by the Minnesota shippers and receivers. In assessing the financial results of operations on the 19.2-mile segment Shaffer utilized the actual revenues from the traffic during the base year of the protesting Minnesota shippers and applied applicant's unit costs to compute off-Line avoidable costs, except that costs for the junction at Dodge Center are CNW's Rail Form A costs per inter/intra train switch in lieu of the modified terminal costs used by applicant. In calculating on-Line avoidable costs Shaffer used actual costs as developed by CNW, prorated and allocated to protestants' traffic on the basis of gross ton miles, car miles and car days, and crew and locomotive time. Exclusive of overhead or opportunity costs the consultant calculated net revenues on the 19.2-mile segment for the base year of $64,872. In developing operating results for a pro forma year Shaffer added the revenue from some 269 additional cars, aggregating more than 13,000 additional tons, and allocated expenses on the same basis as with existing traffic. In this manner Shaffer estimated net revenues for a pro forma year of more than $157,000. Neither calculation reflected CNW's opportunity cost for the 19.2-mile segment, which Shaffer estimated to be $181,608. On the basis of Shaffer's calculations, MnShp alleges that the truncated Sargeant-Dodge segment, if retained in operation, would yield sufficient revenues to cover all operating expenses, plus about 36 percent of the opportunity costs during the base year and 87 percent of such costs during a pro forma year. The witness also suggested a possible scenario for future operations on the 19.2-mile segment, service to be provided by a switching crew at Rochester, MN which would operate over the east-west line of CNW that intersects the Line at Dodge Center. Shaffer did not develop a complete operating plan, however, because, as he stated it to railroad counsel, "...nothing I did you would agree with...whatever I did you would fight and squabble about it for days, so it wasn't worth me even trying."

The proposed abandonment was also opposed by the Zumbro Valley Shipper Association, an informal association of shippers in the Kenyon-Nerstrand area in Minnesota. Counsel for this protestant appeared at the hearing, but offered no evidence, and did not file a brief.

On brief, protestants uniformly contend that the Line has been operated at a profit during the period 1978 through seven months of 1980. Based solely on applicant's financial data adduced herein, and merely "plugging in" the net revenues acknowledged by applicant from

overhead traffic on the Line during this period, protestants assert that the operations on the Line yielded a profit of $2,402,023 in 1978, $3,048,272 in 1979, and $2,180,005 during the first seven months of 1980. These results are predicated on consideration of overhead traffic moving on the Line as well as local traffic, as required, according to IDOT, by the Commission's abandonment regulations. Protestants uniformly condemn applicant for attempting throughout this proceeding to obscure or bury this overhead data despite the fact that overhead traffic on the Line moved to a volume of some 35,000 cars a year prior to June 1980 and in substantial volume thereafter. In this regard IDOT asserts that applicant misrepresented the facts to the Commission in applying for its waiver of overhead data, and on this record has not shown that it will, in fact, retain its overhead traffic over other lines. This Line has been profitable, according to protestants, even after consideration of opportunity costs as computed by applicant, in amounts exceeding $1 million annually. IDOT, in particular, alleges that applicant has grossly overstated its opportunity costs, moreover, by means of inflated net liquidation values and incorrect application of rate of return, and has failed to specify where in its system the reusable assets from the Line will be reinvested. According to IDOT, congress did not intend for the Commission to authorize the abandonment of particular rail lines solely because the carrier's capital investment could more profitably be put to work elsewhere. All of the protestants allege that shippers and the general public along the Line will be adversely impacted by the proposed abandonment, and that applicant has completely failed to establish that there are adequate alternatives to rail service in this area.

IDOT does not dispute that the railroad has experienced avoidable losses on the Line, if only local traffic is considered, or that shippers have been diverting traffic away from the Line in recent years. IDOT takes the position that this situation is attributable solely to a steady decline in the quality and quantity of the railroad's service, a decline that made it imperative for shippers, in order to survive, to find other and more dependable means of moving their freight. The testimony of the Iowa shippers shows, according to IDOT, that at least 927 additional cars of freight would have moved on the Line in 1980 if CNW had provided the cars and if service were improved. IDOT contends that at least since 1974 CNW has failed to adequately maintain the Line to carry local or overhead traffic, and that this reflects an intent on the part of CNW to downgrade service on the Line. IDOT points out that CNW's projected maintenance expense is thousands of times greater than actual, historical expenditures on the Line. Applicant has been precipitous, IDOT asserts, in rushing to abandon the Line without considering other means of relief, such as are available under the Staggers Rail Act of 1980, for example. That act provides, in section 217, that a railroad not earning adequate revenues may establish surcharges applicable to traffic originating or terminating on any line that carries less than 3 million gross tons of traffic per mile. IDOT contends that CNW has made no effort to consider this alternative and has in fact rejected IDOT's interrogatory seeking to obtain such data, and that CNW should not be permitted to abandon the Line without first studying whether this mechanism for providing relief is feasible. IDOT's analysis of the Iowa shipper testimony indicates to it that these shippers have no reasonable alternative to rail transportation, that abandonment of the Line would require shippers to expend substantial funds to convert their facilities to handle increased truck traffic, drastically affect the price farmers receive for their grain and pay for their fertilizer, and overburden the already overburdened highways. IDOT asserts that the Line is a vital link in the state's transportation network, particularly in view of the uncertain future of other lines in the area operated by a bankrupt Milwaukee Railroad and an Illinois Central Gulf Railroad in precarious financial condition. In the alternative, IDOT points to its operating plans for an Oelwein to McIntire segment or an Oelwein to New Hampton segment, segments that now provide CNW with 75

percent and 51 percent, respectively, of the local traffic moving on the Line. Considering shipper projections of potential traffic, according to IDOT, either of these segments could be operated by applicant at a profit.

NEITA also stresses the burden of abandonment on the Iowa shippers, up to $800,000 collectively in capital costs to modify or convert facilities and recurring annual costs of up to $700,000. On brief, NEITA alleges that the evidence shows an intentional downgrading of service on the Line by CNW, and that this is apparent from the withholding over a long period of time of maintenance funds from the Line despite millions of dollars earned on the Line from overhead traffic. To NEITA this reflects a matter of corporate policy on the part of CNW, devised long before the June 1980 decision to divert overhead traffic from the Line, to downgrade service on the line in order to enhance its case for abandonment. The result, inevitably, was to drive business away from the Line. Applicant also sought to enhance its case, according to NEITA, by the unique and unusual projection of maintenance expenses over a 40 to 50-year period, expenses for ties, for example, that reflect a 25,000 percent increase over actual expenditures on the Line. The record is barren, on the other hand, of any evidence of actual maintenance costs required on the Line for a reasonable future period, 3 years or 6 or 10 years, for example. NEITA alleges, also, that applicant made no effort to comply with its statutory obligation to consider various environmental impacts of the proposed abandonment, such as the cumulative effect of this abandonment in concert with the abandonment by CNW of 566 miles of track in 1980 and an additional 1,042 miles of track now in various stages of processing for abandonment by CNW. NEITA also points to the $400,000 per year being paid by CNW as rental for various Rock Island Railroad lines, including the line contemplated by CNW for movement of overhead traffic now or formerly moving over the Line, and suggests that public policy would be better served if CNW expended these funds instead on continuing rail service on the Line.

MnShp opposes the abandonment of only the 19.2-mile Sargeant-Dodge segment of the Line, as noted, and on brief contends that operations on this segment have been profitable to CNW and that the segment is in good condition with no need for rehabilitation. Based on traffic projections of Power Span, Brownsdale and other Minnesota shippers, MnShp asserts that operations can be expected in 1981 to yield net revenues. MnShp recognizes that opportunity costs, whether as computed by applicant or as computed by its own consultant, would render this a deficit operation, but it takes the position that opportunity costs may not be used to make an otherwise profitable operation appear to be unprofitable. Abandonment of this segment, on the other hand, can be expected to have serious and lasting adverse effects on protestant shippers and on the communities in which they are located, according to MnShp. MnShp alleges that where, as here, protestants oppose abandonment of only a portion of a line of railroad sought to be abandoned, then applicant must show by clear and convincing evidence that the burden imposed on the railroad by continued operation of <u>that</u> portion of the line outweighs the public's need for continued operation of that portion of the line. MnShp insists that CNW has not made such a showing, that CNW, in fact, did not address itself to that issue at all. MnShp argues that no justification has been shown for abandonment of the Sargeant-Dodge segment and that abandonment should not be permitted.

MnShp and NEITA place great emphasis on the financial stability of CNW as reflected in the carrier's 1980 report to its stockholders. In sharp contrast with the instant application, in which applicant describes itself as being in "precarious financial condition" and having a working capital deficit in mid-1980 of more than $71 million, its report to its stockholders claims achievement of "record earnings" and a net income for 1980 of more than $39 million. The record shows,

also, that CNW's net income for the first quarter of 1981, as reported to the stockholders, was $11.8 million. As MEITA put it, "This rail line has been a money maker in the past--its bridge traffic has helped add to the 'record profits' enjoyed by the North Western during 1980--and has helped the President of the North Western to honestly say 'the marginality of our system is a thing of the past'."

All of the protestants join in alleging that applicant has failed to discharge its burden of proof to show that the public convenience and necessity permit the abandonment as proposed.

Applicant, on the other hand, alleges on brief that it has met its burden of proof, that the evidence shows that present and future operations on the Line impose an undue burden on applicant and on interstate commerce, and that this burden far outweighs any adverse effect on users or on the communities served by the Line. With regard to its financial condition, CNW points out that its annual report to the Commission, prepared in conformity with the Commission's accounting regulations, shows a net income deficit for 1980 in excess of $2.4 million, and that in Ex Parte No. 353, Adequacy of Railroad Revenue, 362 I.C.C. 198 (decided December 6, 1979), the Commission found CNW's return on investment of 1.54 percent to be reflective of the continuing financial weakness of CNW and to be inadequate to support a sound financial condition. In its marginal financial condition, CNW asserts, it must take all necessary steps to curb its losses and to use its limited resources on its more productive lines. Abandonment of this Line, it contends, will avoid recurring operating losses and free valuable resources for use elsewhere on the system or to generate revenue through sale of these assets. CNW states that the Commission has supported the elimination of low density branch lines as a means by which carriers can achieve financial stability, and that in view of the present "crisis state of the Midwest railroads" it is imperative that CNW redirect its limited resources to providing essential rail service.

Applicant insists that in operating the Line it has incurred avoidable losses in the amounts previously described, and that, taking into consideration opportunity costs, its total avoidable losses on the Line were $1,568,506 in 1978, $1,542,880 in 1979, and $854,758 during the first 7 months of 1980, calculated as set forth in Appendix B. In the latter regard, applicant states that it has calculated opportunity costs using methodology approved by the Commission, and it points out that the Commission has recognized that opportunity costs are real economic costs experienced by railroads when they forego more profitable use of their resources, and that such costs can be a significant factor in determining whether a particular line at issue is imposing a burden on interstate commerce. Applicant also points out that maintenance on the Line has been minimal, consistent with safety of operations, in an effort to economize and to allocate its limited funds to more productive lines. Applicant notes that just to maintain the Line in the future at minimal Class I FRA standards will entail annual expenditures of $741,585, and it contends that it would be an improvident use of funds to make such expenditures on a line that cannot pay its own operating costs. As seen, applicant's calculations totally exclude consideration of overhead traffic, consistent with its corporate decision that overhead traffic will no longer be routed over the Line. The routing of overhead traffic, applicant insists, is completely a matter of managerial discretion, and applicant contends that the Commission has long recognized that it is the carrier's prerogative to use its facilities in the most efficient and least costly manner consistent with its public obligations. In today's world of spiraling material, fuel and labor costs, according to applicant, the ability of management to rationalize the CNW system has been a key to the survival of CNW.

Applicant is critical of IDOT's evidence, stressing that even by IDOT's computations the Line fails to yield net revenues when consideration is given to opportunity costs and that only by exclusion of opportunity costs would the Oelwein-New Hampton segment show net revenues, but only on the basis of costs of capital and net liquidation value not computed in accordance with the Commission's regulations. Applicant acknowledges that it has not considered the imposition of surcharges as provided under the Staggers Act, but notes that IDOT made no study to determine whether surcharges would only further erode traffic on the Line or whether such charges would be acceptable to the shippers. Primarily, applicant is critical of IDOT's benefit/cost ratio, calling it questionable because it is based on overstatements of shipper benefits and understatements of costs. Insofar as benefits are concerned, according to applicant, the ratio ignored the beneficial impacts of an abandonment, such as increased jobs in trucking, and considered increased expenditures on public roads as an impact caused by abandonment, regardless of reasons for poor maintenance of the roads in the past. Insofar as costs are concerned, the ratio considered only the incremental costs of upgrading and maintaining the Line at FRA Class II standards, completely ignoring the railroad's costs of operations. Further, according to applicant, the benefit/cost ratio is based on gross errors in calculating a rate of return for CNW and in reducing CNW's net liquidation value.

Applicant is equally critical of the Minnesota protestants. Here again, applicant points out, even the "best case" put forth by MnShp fails to establish that the Line or the Sargeant-Dodge segment of the Line will yield net revenues when all pertinent costs are considered. Applicant contends, moreover, that MnShp's consultant relied on inflated traffic projections, on expenses that would have no bearing on future operations, on significantly understated maintenance costs, and on unverified data relating to crew costs in reaching his conclusions. Applicant points out, for example, that the consultant admitted that he didn't know how much it would cost to maintain the 19.2-mile segment, yet he prorated maintenance costs for 19.2 miles and apportioned the expense on the basis of protestant shippers' gross tonnages to reach a maintenance-of-way expense of only $279 per mile even though, if Sargeant-Dodge is the only segment retained, protestants' traffic would have to pay the entire maintenance expense and not just an apportionment based on tonnage.

Applicant is most critical of shipper traffic projections, stressing that while many testified that they would have shipped more cars if the railroad had supplied cars, few were able to state that they had actually ordered such cars, and that actual historic traffic data does not support their optimistic projections. Applicant contends that, to the contrary, traffic moving on the Line has plummeted in recent years with no apparent prospect for a turnaround. Grain shippers, it asserts, are turning to truck and barge, and fertilizer retailers are increasing their truck usage. Applicant concedes that some shippers will experience increases in costs as a result of the abandonment, but maintains that the Commission will not deny an abandonment application merely to preserve a shipper's competitive edge by holding down its transportation costs. One of the major shippers on the Line, Sara Lee, can avoid all cost increases, according to applicant, by a simple, one-time modest expenditure to buy the 4,400 feet of CNW track necessary to connect with the line of the Milwaukee, a line that applicant contends will be a part of Milwaukee's basic core structure after that railroad is reorganized, and another major shipper, Power Span, which chose to locate on the Line with full awareness of its imminent abandonment, can subsidize the Sargeant-Dodge segment in concert with other affected shippers to retain service. On its part, applicant sees no end to exhorbitant losses on the Line, and alleges that it is in the interest of the general shipping public that CNW be permitted to rid its system of this excess line by abandonment.

Applicant points out, finally, that no shippers appeared in opposition to abandonment of the approximately 40 miles of line between Dodge Center and Randolph, or the approximately 25 miles of line between McIntire and Sargeant, and surmises that to shippers and receivers located thereon the abandonment is of little interest.

GENERAL DISCUSSION AND CONCLUSIONS

Applicant may abandon this Line, under the statute, only if the Commission finds that the present or future public convenience and necessity require or permit the abandonment, in whole or in part. This requirement that a proposed rail abandonment meet the test of public convenience and necessity has not been changed in some 60 years, and since the early 1920's the decisions of the Commission in rail abandonment proceedings have reflected its view that rail abandonments are part and parcel of the national transportation policy established by the congress. Currently, and as here pertinent and set forth at section 10101a of the act, that policy is to promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues, to ensure the development and continuation of a sound rail transportation system to meet the needs of the public and the national defense, and to foster sound economic conditions in transportation and ensure effective competition and coordination between rail carriers and other modes. As it was early stated by the Supreme Court, the Commission in administering the statute must protect interstate commerce from onerous burdens which may affect the ability of rail carriers to discharge efficiently their transportation duties to the public, and at the same time protect the public and involved communities from undue injuries that may result from a rail abandonment. Colorado v. United States, 271 U.S. 153 (1926). A balancing is required, a weighing of the benefits accruing to local interests from continued operation of the line proposed to be abandoned against the burden which continued operation would impose on the carrier and on interstate commerce. Before an abandonment may be authorized it must appear that continued operation of the line imposes upon the railroad and on interstate commerce a burden of sufficient magnitude as to outweigh any and all injuries to local interests that may result if the ine is abandoned. The burden of proof in this respect is upon the applicant. Abandonment of Branch by Pere Marquette, 72 I.C.C. 303 (1922). There is today, also, the additional element that congress has written into the act, that in making its finding as to public convenience and necessity the Commission must consider whether the abandonment will have a serious, adverse impact on rural and community development, 49 U.S.C. section 10903(a).

Considering first the burden imposed on the railroad and on commerce by continued operation of the Line, the evidence is convincing that during 1978, 1979, and the first 7 months of 1980, at least, operations on the Line have been far from a financial drain on applicant or a burden on commerce. To the contrary, the Line yielded substantial net revenues. As computed by applicant, overhead revenues on the Line in 1978 exceeded line-haul expenses (based on replacement costs) by more than $2.5 million and by more than $2.8 million if historical costs are used, and applicant concedes that net overhead revenues would be "somewhere in between" those two figures. Applying the average of those net overhead revenues to applicant's cost and revenue data as shown in Appendix B, applicant's avoidable loss from operations in 1978, $326,850, was actually a net revenue of more than $2.4 million. Similarly, in 1979 and the first 7 months of 1980, applicant had net revenues, on this basis, of more than $3 million and $2.1 million, respectively. Making allowance for opportunity costs as computed by applicant does not alter the fact that operations on the Line during these periods yielded net revenues. In the latter regard, opportunity cost has been defined as the economic loss experienced by a carrier when it foregoes some other, more profitable use of its resources, such as a branch line, i.e., an investment, such as is

represented by a branch line, which brings a return to a carrier that is less than the cost of capital represents an opportunity cost. Texas and Pacific Railway Company Abandonment, 363 I.C.C. 666 (1980). The Commission in recent years has considered opportunity cost as a factor, one of many, in fact, in its determinations of whether public convenience and necessity permit the abandonment of rail lines in particular cases. See Texas and Pacific, supra, and the decision of the Seventh Circuit in Farmland Industries, Inc. v. United States and Interstate Commerce Commission (No. 80,1308, decided March 3, 1981). In this proceeding, as in others, opportunity costs must be weighed in the balance to determine whether there is undue burden on the carrier and on commerce.

As indicated, applicant calculated opportunity costs by multiplying the sum of its avoidable loss, working capital, and net liquidation value by its cost of capital, in this case the same 9.3 percent developed in Texas and Pacific, supra, as the appropriate, inflation-adjusted cost of capital rate for determination of opportunity costs and the most recent assessment by the Commission of the railroad industry's cost of capital. For the base year this resulted in an opportunity cost of $1,227,494. This sum was then added to avoidable loss from operations to arrive at total avoidable loss. This methodology is erroneous because it results in double counting of avoidable loss by first using avoidable loss in the base and then adding it back into the opportunity cost. Also, to follow the precedent established in Texas and Pacific, supra, working capital as well as avoidable loss should be eliminated from the base, and opportunity cost should be calculated as the result of net liquidation value multiplied by the cost of capital, 9.3 percent. For this calculation it is first necessary to review applicant's computation of net liquidation value of $12,985,885. A significant factor in that computation, more than $8 million, is attributed to the value of reusable rail and track material. These items were valued at from 50 percent to 75 percent of new, which resulted in unusually high prices for relay rail and other track material, valuations beyond a zone of reasonableness and which presume an equal demand for 90-pound rail as for the more widely used 115-pound rail. Because of the general obsolescence of lighter weight rail, the diminished manufacturing capacity for this size stock may cause it to become scarce and to command higher prices than the more standard rail. In contrast to CNW's theoretical approach to this pricing, IDOT's engineering witness, Johnson, went to the marketplace and established practical valuations which are more reasonable and acceptable. Applying Johnson's valuations to this material, as previously described, reduces the net liquidiation value by $2,059,100 to a total of $10,926,785. The product of that sum multiplied by 9.3 percent is an opportunity cost for the base year of $1,016,191. Appendix F hereto is a restatement of the revenue and cost data shown in Appendix B for the base year and estimated subsidy year, incorporating the corrections above discussed, and also a subsidy rate of return of 12.1 percent. As noted, CNW used 16.979 percent as its cost of capital for road property, calculated as previously described. While the methodology employed by applicant may have some merit, it is not well substantiated. The net income figures used are not supported and do not correspond to the figures provided in the carrier's income statements, and CNW did not weight its cost of capital by the proportion of debt and equity comprising its capital structure. A more appropriate cost of capital would be the carrier's current after-tax cost of capital as found by the Commission in Adequacy of Railroad Revenue, 364 I.C.C. 311 (1980). There, the Commission found a composite cost of capital, 11.22 percent, which was predicated upon an embedded cost of railroad debt, 7.8 percent, and a cost of equity capital, 13.5 percent. The current cost of railroad debt was found to be 10 percent. By substituting the current cost of debt for the embedded rate, the current cost of capital becomes 12.1 percent, and this is the appropriate return element to use for subsidy calculations as required by 49 CFR 1121.45(a), which provides that the current cost

of capital should be used. This is in keeping, also, with the findings of the Commission in Ex Parte No. 393, Standards for Railroad Revenue Adequacy (served March 30, 1981), to the effect that the adequacy of the railroads' rate of return should be measured by their current cost of capital. As seen, applicant is not in a tax paying posture, and thus its after-tax cost of capital may be considered to be the same as its pre-tax cost, 12.1 percent.

Base year operations as depicted in Appendix F show positive results, that is, a net revenue return based on actual, historical data. It is the essence of applicant's case, however, that the great volume of overhead revenues reflected in this data must be ignored because applicant, as a matter of managerial discretion, has determined that overhead traffic will no longer move on this Line. There is ample precedent for the proposition advanced by applicant that the routing of overhead traffic and the selection of alternate routes for the handling of such traffic is a matter of managerial discretion. See Baltimore & Ohio R. Co. Abandonment, 354 I.C.C. 240 (1978) and Southern Pacific Transp. Co.--Abandonment, 360 I.C.C. 138 (1979). Protestants' basic argument in Baltimore & Ohio, supra, as here, was that applicant had failed to prove that the line proposed to be abandoned was operating at a loss. The evidence there showed that operating losses would have been incurred if overhead movements were not considered. In approving the abandonment, the Commission noted that it has long recognized that, while revenues derived from overhead traffic are a factor in determining a line's earning capacity, in the final analysis it is the revenues produced by traffic originating and terminating on a line, and the expenses incident to such traffic, that is the principal criteria in determining whether there exists a real need for the continued operation of the line. The Commission stressed that carriers should be free to use their facilities in such a manner as they deem necessary for the promotion of economy and efficiency, and that local shippers who are unable to support a railroad line cannot demand continued rail transportation simply because the line is used for the movement of overhead traffic, traffic which could be handled as expeditiously over other routes. More recently, in No. AB-7 (Sub-No. 76), Chicago, Milwaukee St. P. & P. R. Co., Abandonment, decided December 3, 1979 (not printed), division 2 of the Commission stated that so long as shippers can route overhead traffic over similar routes, the contribution of overhead traffic moving over a line proposed to be abandoned will not be considered. In the instant proceeding, as seen, applicant has shown that it has various, adequate alternatives for routing its overhead traffic now or formerly moving on this Line, and that a management decision has been made to divert from the Line all remaining overhead traffic. Applicant's officials freely acknowledged that this decision was made in contemplation of this abandonment, pointing out that the shifting of overhead traffic away from the Line is a step in the overall rationalization of its entire system for reasons of economy and efficiency. Thus, while on its face, applicant has by corporate decree rendered a profitable line unprofitable, the move is, in a larger sense, in accord with overwhelming Commission precedent.

Much was made, as stated, by protestants regarding the glowing financial reports made by CNW to its stockholders in contrast to the "precarious" financial condition reported to the Commission. As required under the Commission's Uniform System of Accounts, Class I railroads report to the Commission under the so-called betterment accounting method4/ under which expenditures for the like replacement of track structures are immediately expensed, rather than capitalized

4/ In a proposed rulemaking proceeding, No. 36988, Alternative Methods of Accounting for Railroad Track Structures, decided June 10, 1981, the Commission is now considering a change in its method of accounting for track structure from betterment to depreciation accounting.

and expensed over the useful life of the track as with depreciation accounting. To its stockholders, on the other hand, CNW and many other carriers report on the depreciation accounting method. Under the latter method reported expenses are much lower and net income, as a result, is higher. Conversely, reported expense is much greater under betterment accounting and net income is lower. Under either method, however, the railroad has actually spent the same amount of money on track structures in any given year, the result just looks different depending on the accounting method used. Analysis of all pertinent financial data of CNW strongly indicates that, although its prospects have brightened recently, CNW is in marginal financial condition. It is well established, in any event, that every branch line must pay its own way, regardless of whether the carrier's system as a whole is profitable or unprofitable, and that unprofitable and unnecessary branch line operations are a drain upon the carrier and a burden upon interstate commerce. See New York Central R. Co. Abandonment, 254 I.C.C. 745 (1944).

Protestants also allege, as seen, that the financial results of operations on the Line were influenced by a policy on the part of CNW to downgrade the service on the Line. Downgrading results when a carrier curtails service on a line in order to suffocate a viable transportation agency. It does not constitute downgrading, on the other hand, when a carrier defers the expenditure of funds for maintenance and services to conform with reasonable priorities for the expenditure of limited funds. Where the intent is to preserve for as long as possible a marginal service in the face of the necessity to rationalize a rail system and weed out non-productive services, this is a reasonable act of economy and not downgrading. The testimony of the shipper witnesses amply demonstrates that service on the Line has not been all that it could or should be, and strongly suggests that much traffic was lost on this account. The record will not support a finding, however, that applicant has engaged in a deliberate and calculated effort to downgrade this Line for the purposes of this abandonment proceeding. Compare Missouri-Kansas-Texas R. Co. Abandonment, Okla., 338 I.C.C. 728 (1971).

The evidence of record is persuasive that, with declining usage of the Line by shippers and receivers located thereon, continued operation of the Line will impose a burden on applicant and on interstate commerce. Applicant has shown, moreover, that it is likely to retain on other lines the overhead traffic now moving on the Line, and that there is need elsewhere in its system for reusable track and other materials in the Line or that these assets may be liquidated to provide needed cash to CNW. This burden, as noted, must be balanced against the burden that will be imposed by an abandonment on the users and on the general public. In addition, there must be specifically considered whether this abandonment will have serious, adverse impact on rural and community development.

Considering first the impact on rural and community development, it is not apparent on this record that the impact will be serious. The involved shippers herein are in many instances major businesses in the several small communities on the Line and there are affected shippers and receivers in the rural areas that surround the Line, but the evidence does not establish that the proposed abandonment, which will adversely affect many of these shippers and recivers, will have serious, adverse impact on rural or community development. The community of Hayfield, for example, which opposed this abandonment, has been able to attract new businesses despite the specter of imminent rail abandonment, and several of its leading employers as well as other businesses do not require rail service. There is no indication that the effect on other communities will be more serious or that rural areas will be adversely impacted to any greater extent. At most there will be some hampering effect on economic growth and development

immediately following the abandonment in some instances, and some increase in congestion and wear on local highways. But this will likely be offset in the long run by the benefits of increased motor carrier services that usually are attracted to fill the void.

More serious adverse impact may be expected on many of the shippers and receivers in the area. As previously described, expensive adjustments will have to be made in their facilities to permit increased motor carrier use in lieu of rail, and as a result of the changeover many will have substantial recurring expenses. As described in Appendices D and E hereto, many will have to alter their shipping practices, shift their sources of supply or markets, or give serious consideration to relocation of their business, and others may be caught in a price squeeze between their customers and their competition. The effect, while serious, does not appear to be catastrophic. Some of these shippers and receivers have the remedy within their grasp, but have some hard decisions to make. Sara Lee, for example, has the option, for a moderate cost, to purchase its connection to the Milwaukee Railroad. For others, Power Span for example, the solution is not that simple. But all will have adjustments to make, because the inevitable result of almost every rail abandonment includes inconvenience and disruptions, and in many instances increased transportation costs. It is well established, on the other hand, that a railroad cannot be expected to operate a line of railroad at a deficit merely to benefit its users or to continue to perform operations because shippers on the line may have invested in facilities or improvement in the expectation of continued rail service. See Chicago, M. St. P. & P. R. Co. Abandonment, 312 I.C.C. 667 (1961). Where the foreseeable adverse impacts of abandonment are outweighed by the requirements of interstate commerce as a whole, the abandonment of a particular rail line is justified and should be approved and authorized. Chicago and North Western Transp. Co.--Abandonment, 348 I.C.C. 708 (1976), and St. Louis-S. F. Ry. Co. Abandonment, 328 I.C.C. 34 (1965).

The evidence of record herein is not convincing that there is enough traffic originating and terminating on this Line to support continued operations on the Line. As previously discussed, many projections were made as to the volumes of traffic that would be tendered to CNW on the Line if operations are continued. Only time would tell whether these projections would ever materialize into actual revenue-producing traffic, time that would be paid for by CNW in continuing deficits from originating and terminating traffic on the Line. These projections leave unanswered the question of where was this traffic last year or the year before. If, as indicated by some protestants, this traffic did not materialize because the railroad failed to furnish cars to move this traffic, the evidence shows that shippers on the Line fared as well if not better than other shippers on applicant's system in the matter of car supply, and there is nothing in this record to show that, given this carrier's financial condition, car supply in the future would be any better. It is not unusual in rail abandonment proceedings for shippers to project traffic potentials that far exceed past or present traffic patterns. The Commission has often stated, on the other hand, that absent a contrary showing by protestants, it will be presumed that past and present levels of traffic on a line will continue into the future. See Chicago and North Western Transp. Co.--Abandonment, 360 I.C.C. 647 (1980). If present traffic levels on the Line are attributable to poor service, as alleged by many protestants, the evidence is equally clear that to the extent that CNW's service was slow, unreliable, or otherwise unsatisfactory to the shippers the root cause of such service shortcomings was and is the deteriorated condition of the Line, a condition that will not go away without the expenditure of substantial sums of money. Increased expenditures to rehabilitate and maintain the Line would in turn require further increases in revenues to support the

Line. There is no probative evidence in this record that such levels of revenue can be attained on this Line. As earlier stated, several alternate proposals for partial abandonment were offered by protestants. None of these proposals were drawn with sufficient detail to permit comprehensive analysis as to profitability, and each relied upon traffic projections made by the shippers. Based upon actual traffic and revenue data of record, none of these alternate proposals gave promise of sufficient revenues to overcome all pertinent expenses, including opportunity costs, so as to produce net revenues. Contrary to the position taken by protestants, the burden of proving the viability of suggested alternatives to abandonment, such as partial abandonment, is upon protestants. State of Me. Dept. of Transp. v. I.C.C., 587 F2d 541 (1978) and Village of Candor v. United States, 151 F. Supp. 889 (1957). Protestants have failed to sustain that burden.

Perhaps the weakest link in applicant's case is its failure to adequately identify alternate transportation services available to offset abandonment of the Line. As noted, its direct evidence in this regard was stricken as unreliable. However, numerous available motor carriers were identified by knowledgeable shipper witnesses on cross-examination, and the record clearly shows that almost every shipper and receiver testifying herein is being served to an increasing extent by motor carriers operating in the area. The fact of the matter is that today, more than ever before, the motor carrier industry is providing service where a need for service is shown, because today, given the present state of motor carrier deregulation, almost no barrier is interposed by regulation to motor carriers initiating needed transportation services. The moving philosophy in regulation now is that marketplace factors and competition dictate the need for motor carrier services, and if abandonment of this Line creates a greater need for motor carrier services such carriers will appear to fill the void. The record as a whole is persuasive that adequate motor carrier, barge and rail transportation services will be available after abandonment of the Line to serve the shippers and receivers in the affected areas.

All the evidence of record considered, the conclusion is warranted that the present and future public convenience and necessity permit the abandonment of the Oelwein-Randolph Line as sought. This conclusion will seem harsh and insensitive to many shippers and receivers, (and it is,) but it accords with the statute as it is interpreted in Commission precedent and reflects the intent of congress that essential railroad systems must be preserved. A word of caution to the railroad, however. Although the proposed abandonment has been justified under the statute, authority granted by the Commission to abandon a line of railroad is permissive only. It is the railroad that must take the final step. Once a line of railroad is abandoned it is probably gone forever, and it would be well for the applicant, in its own interest, before giving effect to the authority hereinafter granted, since it has had the opportunity now to more fully gauge the deep interest of its users in continued operation of the Line, to re-examine its options and the decisions made which brought this matter to its present posture.

The environmental and energy impacts of this proposed abandonment have been examined, including considerations of air, water and noise pollution, public safety, and energy consumption. The record supports the findings in the environmental assessment that this abandonment will not cause any significant adverse energy consumption or environmental impacts. However, because the right-of-way traversed by the Line may be suitable for recreational or other public use, a public use condition will be imposed which will prohibit the sale or removal of the rail property for a period of 120 days.

Premises considered, The Administrative Law Judge finds that the present and future public convenience and necessity permit the abandonment by The Chicago and North Western Transportation Company of its

line of railroad, 144.8 miles between Oelwein and Randolph as hereinbefore described, subject to conditions for the protection of railroad employees as set forth in Oregon Short Line R. Co.--Abandonment, Goshen, 360 I.C.C. 91 (1979), and subject to the further condition that The Chicago and North Western Transportation Company shall keep intact all of the right-of-way, track, bridges, and drainage culverts on the Line for a period of 120 days from the date of service of this decision to permit any State or local governmental agency or other interested persons to negotiate the acquisition for public use of all or any portion of the Line. The Judge further finds that this action does not significantly affect the quality of the human environment or the conservation of energy resources.

It is Ordered:

1. The findings in this decision shall be published in the Federal Register concurrently with the service of this decision. Offers by any person or government entity for financial assistance or purchase of the line, to enable service to be continued, must be tendered to the carrier within 10 days following publication of this notice. The offer must also be filed concurrently with the Commission, and comply with requirements of 49 CFR 1121.38 (see 49 USC 10901, as amended by section 402(c) of the Staggers Rail Act of 1980). After receiving appropriate notice that an offer of financial assistance is being considered, CNW shall comply with the information requirements in 49 CFR 1121.38(f) and 49 USC 10905(c) as amended by section 402(c) of the Staggers Rail Act of 1980.

2. All correspondence to the Commission containing offers of financial assistance for continued operation or acquisition of the line shall contain an appropriate reference to this proceeding. The following notation shall be typed in boldface in correspondence: Section of Finance, AB-RSCP.

3. Subject to the conditions set forth above, an appropriate certificate of abandonment shall be issued. CNW shall not effect abandonment prior to the effective date of the certificate of abandonment.

4. This decision shall be effective 30 days from the date it is served.

5. If the authority granted by this decision is not exercised within one year from the effective date it shall be of no further force and effect.

By the Commission, Paul J. Clerman, Administrative Law Judge.

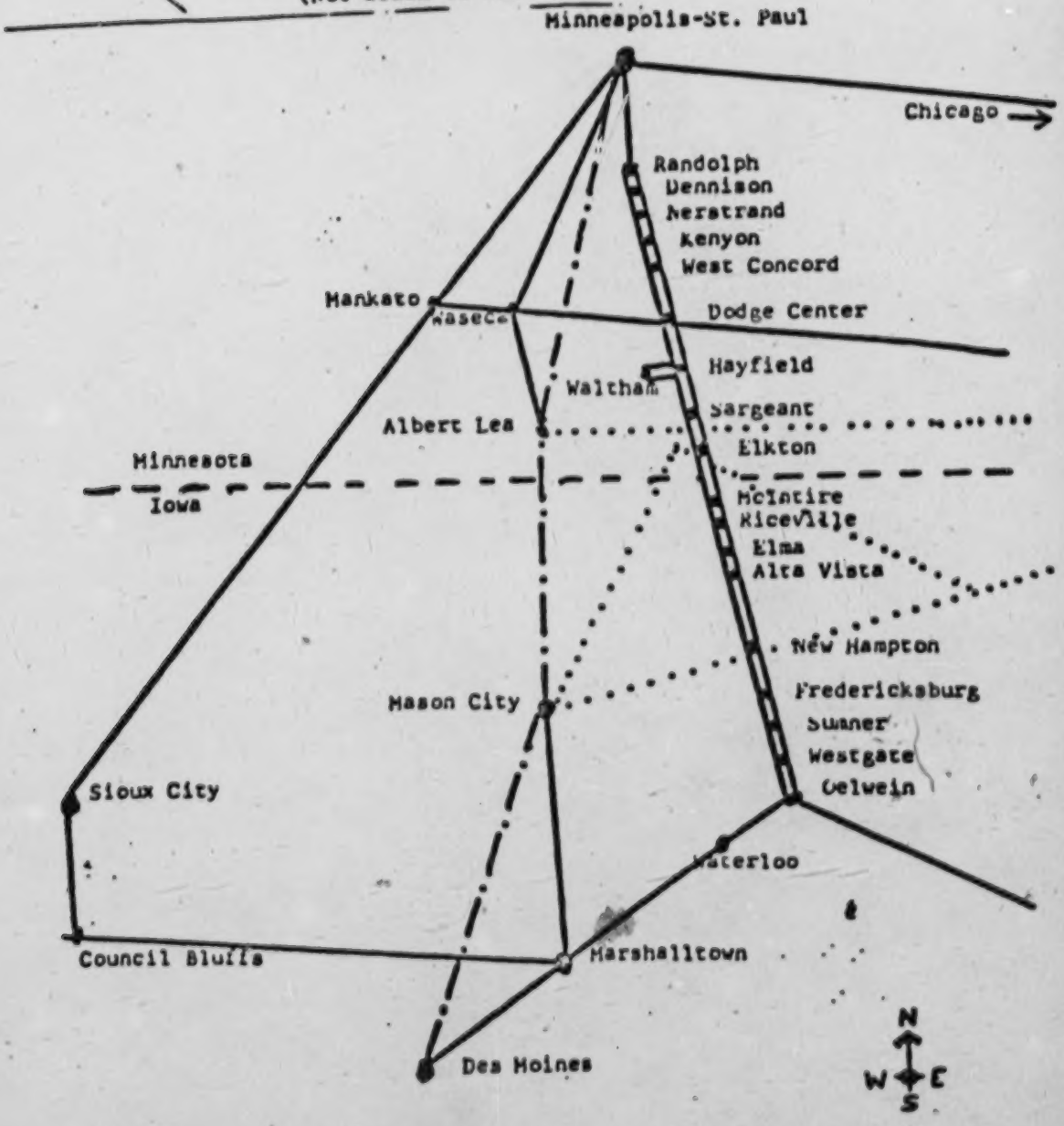
AGATHA L. MERGENOVICH

Secretary

(SEAL)

APPENDIX A

Straight-line Map of Proposed Abandonment
(Not drawn to scale)



APPENDIX B

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
OELWEIN, IOWA TO RANDOLPH, MINNESOTA
Revenue And Cost Data
For The Years 1978, 1979, Seven Months Ended July 31, 1980, The Base Year And The Estimated Subsidy Year

	1978	1979	Seven Mos. Ended July 31, 1980	Base Year (Note 1)	Estimated Subsidy Year (Note 2)
REVENUES ATTRIBUTABLE FOR					
1. Freight Orig. and/or Term. on Branch	$1,265,820	$1,363,161	$ 794,899	$1,420,566	$ 1,623,115
2. Bridge Traffic	-	-	-	-	-
3. All Other Revenue and Income	49,151	46,020	12,843	28,242	29,654
4. Total Revenues Attributable (lines 1 thru 3)	$1,314,971	$1,409,181	$ 807,742	$1,448,808	$ 1,652,769
AVOIDABLE COSTS FOR					
5. On-Branch Costs (lines 5a thru 5j)					
a. Maintenance of Way and Structures	$ 402,398	$ 437,413	$ 301,107	$ 468,041	$ 741,383
b. Maintenance of Equipment	43,254	41,525	22,599	38,681	42,092
c. Transportation	309,168	304,869	168,276	288,414	306,581
d. General Administrative	-	-	-	-	-
e. Deadheading, Taxi and Hotel	3,131	2,800	1,494	2,634	2,787
f. Overhead Movement	-	-	-	-	-
g. Freight Car Costs	140,490	146,422	60,637	117,089	133,784
h. Return on Investment - Locomotives	40,365	47,920	25,238	42,995	48,125
i. Revenue Taxes	14,114	-	-	-	-
j. Property Taxes	-	-	-	-	-
	$ 952,920	$ 981,009	$ 580,161	$ 957,854	$ 1,274,952
6. Off-Branch Costs (lines 6a and 6b)					
a. Freight orig. and/or term. on branch	$ 688,881	$ 711,406	$ 362,872	$ 665,200	$ 760,048
b. Bridge Traffic	-	-	-	-	-
	$ 688,881	$ 711,406	$ 362,872	$ 665,200	$ 760,048
7. Total Avoidable Costs (lines 5 plus line 6)	$1,641,821	$1,712,415	$ 943,233	$1,623,054	$ 2,034,000
AVOIDABLE LOSS					
8. a. Avoidable Loss from Operations (line 4 minus line 7)	$ 326,850	$ 303,234	$ 135,491	$ 174,266	$ 383,231
b. Opportunity Costs	1,261,656	1,239,646	719,267	1,227,494	-
c. Total Avoidable Loss (lines 8a thru 8b)	$1,588,506	$1,542,880	$ 854,758	$1,401,760	$ 383,231
REHABILITATION COSTS FOR					
9. Rehabilitation	$ -	$ -	$ -	$ -	$ -
10. Administrative Costs (Subsidy Year Only)	-	-	-	-	16,528
11. Casualty Reserve Account (Note 3)	-	-	-	-	-
12. Total Subsidization Costs (lines 9 thru 11)	$ -	$ -	$ -	$ -	$ 16,528
RETURN ON VALUE FOR					
13. Valuation of Property (lines 13a thru 13c)	$ -	$ -	$ -	$ -	$ 31,687
a. Working Capital	-	-	-	-	12,985,889
b. Income Tax Benefits	-	-	-	-	13,017,576
c. Net Liquidation Value	-	-	-	-	16,070
	- %	- %	- %	- %	
14. Rate of Return	$ -	$ -	$ -	$ -	$ 2,213,649
15. Total Return on Value (line 13 times line 14)					
ESTIMATED SUBSIDY					
16. Estimated Subsidy (line 4 minus 7, 12 and 15)	$ -	$ -	$ -	$ -	$ 2,613,408

NOTES: 1. Base Year data reflects actual operations for the twelve months ended July 31, 1980.
2. Estimated Subsidy Year ended July 31, 1981 reflects the same train operations as the base year.
3. The rehabilitor shall be required to obtain insurance for an amount equal to CNTV's uninsured liability ($2,500,000) holding the CNTV harmless from any loss, damage, destruction, injury or death resultant from operations of this line, and must pay its proportionate share of the CNTV's system insurance costs.

APPENDIX C

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE

Main Track	144.8 Miles
Other Track	24.8 Miles
Total All Tracks	169.6 Miles

Land					
2,107.48	Acres which possibly can be sold to various persons at an estimated total value of $1,742,000				$(1,742,000)
Bridges, Trestles and Culverts					
Bridge timber, usable	53.322 MBM	@	$ 365.00	$(19,463)	
Bridge steel, usable	264.2 NT	@	632.20	(167,027)	
Bridge steel, scrap	219.0 NT	@	77.82	(17,043)	
					(203,533)
Ties					
Cross ties, usable	222,100 Ea.	@	5.04	(1,119,384)	
Switch ties, usable	143.604 MBM	@	224.38	(32,222)	
					(1,151,606)
Rail					
115# Usable	14,887.172 NT	@	312.90	(4,658,196)	
112# "	944.029 NT	@	312.90	(295,387)	
100# "	480.983 NT	@	312.90	(150,500)	
90# "	10,246.020 NT	@	312.90	(3,205,980)	
112# Scrap	9.539 NT	@	79.64	(760)	
100# "	9.817 NT	@	79.64	(782)	
90# "	1,138.455 NT	@	79.64	(90,667)	
85# "	1,331.256 NT	@	79.64	(106,021)	
75# "	838.941 NT	@	79.64	(66,763)	
60# "	82.780 NT	@	79.64	(6,593)	
					(8,581,649)
Other Track Material					
Crossing Diamonds, usable	2 Ea.	@	15,000.00	(30,000)	
	#12-115# 1 TO	@	9,216.37	(9,216)	
Turnouts complete, usable	#12-90# 1 TO	@	6,956.69	(6,957)	
	#10-115# 13 TO	@	7,817.74	(101,631)	
	#10-90# 3 TO	@	5,899.75	(17,699)	
	#9-90# 1 TO	@	4,963.53	(4,964)	
	#8-90# 10 TO	@	4,001.86	(40,019)	
	#8-85# 1 TO	@	3,797.20	(3,797)	

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE - CONTINUED

Other Track Material (continued)					
Switches, frogs, guard rails switch lamps and switch stands					
Scrap	151.660	NT @	$ 64.18	$(9,734)	
Tie plates (Gross less 10% estimated loss)					
Usable	125,905.18	Cwt.@	18.82	(2,369,535)	
Scrap	368.991	NT @	91.67	(33,825)	
Joint bars (Gross less 10% estimated loss)					
Usable	19,000.75	Cwt.@	26.25	(498,770)	
Scrap	627.519	NT @	91.67	(57,525)	
bolts, nutlocks & spikes, etc. (Gross less 25% estimated loss)					
Scrap	1,129.216	NT @	91.67	(103,515)	
					$(3,287,187)
Signals					(115,500)
Communications					
Copper Wire	13,566	lbs.@	0.76	(10,310)	
Hot Box Detector	1	Ea. @	12,000	(12,000)	
					(22,310)
Buildings					(7,500)

OELWEIN, IOWA TO RANDOLPH, MINNESOTA
INCLUDING HAYFIELD TO WALTHAM, MINNESOTA

ESTIMATED LIQUIDATION VALUE - CONTINUED

TOTAL ESTIMATED GROSS LIQUIDATION VALUE	$(15,111,285)

Estimated cost of labor and material recovering and dismantling property	
Bridges	$ 25R,000
Track	1,470,400
Restoring street and highway crossings	225,000
Land disposal	3,000
Signals	153,800
Communications	11,300
Buildings	3,900

TOTAL ESTIMATED COST OF LABOR AND MATERIAL RECOVERING PROPERTY	$ 2,125,400
TOTAL ESTIMATED NET LIQUIDATION VALUE	$(12,985,885)

MBM - 1,000 board measure
NT - Net ton of 2,000 pounds
Ea. - Each
TO - Turnout
Cwt. - Hundredweight
Lbs. - Pounds

APPENDIX D

PROTESTANT IOWA SHIPPERS

First Miss, a manufacturer of fertilizer and farm chemicals at Sumner, distributes its products to about 100 farmers within a 10-mile radius of Sumner. It is here concerned with its inbound traffic of chemicals and fertilizer ingredients. Liquid products inbound move primarily by truck, but dry products, about 60 percent of its traffic, move by rail. Inbound rail traffic in 1980 was 36 cars, 3,553 tons, consisting of 24 cars of potash, 10 cars of diammonium phosphate, and one car each of anhydrous ammonia and urea. In 1979 First Miss received 30 cars and in 1978 45 cars. Because of cost considerations it desires to receive all of its dry fertilizer by rail. Loss of rail service at Sumner would entail additional costs to First Miss of $6.50 per ton on diammonium phosphate, which would have to be diverted to a facility at Oran, IA and transshipped by truck to Sumner, a distance of 35 miles. Also, trucking of potash from Waterloo, IA, at which point unit trains of potash are received from Canada, would cost First Miss an additional $1.75 per ton over the trucking allowance given by the vendor. If rail service to Sumner is eliminated, First Miss would also have to expend up to $50,000 to modify its facility to accommodate increased truck service. Its storage capacity at Sumner for dry fertilizer is 1,800 tons, but it is increasing its potash storage capacity because of unreliable rail service and to take advantage of lower prices in the off-season. Due to competitive conditions and supervisory problems, First Miss believes that it is impractible to service customers beyond a 10 to 12-mile radius of Sumner.

Thermogas, a producer and distributor of fertilizer, chemicals and propane gas at Sumner, uses rail service to receive basic ingredients for its fertilizer, primarily potash and phosphoric acid. In 1980 Thermogas received 91 cars of potash, 9,100 tons, which it used in the production of 12,000 tons of mixed fertilizer. For its fertilizer operations it needs 7,000 tons or more of potash annually, which comes from sources in Canada and North Carolina. Fertilizer constitutes about 65 percent of its business. It has been increasing its inventories in order to have sufficient product on hand during the fertilizing season. It recently spent about $800,000 to improve its Sumner facility and can now store more than 10,000 tons of dry fertilizer. Thermogas does not find it feasible to service a trade area of more than a 10 to 12-mile radius of Sumner.

Overton, a distributor of chemicals and detergents at Sumner, receives up to 20 percent of its traffic by rail. In 1980 it received 33 cars of chemicals, about 2.8 million pounds. All other inbound traffic and all of its outbound traffic moves by truck. Over the past several years its rail service has declined from five times a week to two times a week. If rail service is discontinued, it will incur the additional expense of short-hauling its shipments by truck from the nearest railhead, or it will consider relocating its business.

Meinerz, a producer of cheese, butter, and dried milk and whey at Fredericksburg, uses rail to ship and receive dry products and to receive fuel oil. In 1980 it shipped 39 cars but received none. In 1979 it shipped 103 cars and received 23 cars. In that year its total shipments aggregated more than 33 million tons, of which almost 8 million tons moved by rail. Its rail usage has declined because service has become unreliable. Several instances of poor service were cited, but there is no allegation that sales were lost because of poor rail service. Meinerz Maintains its own fleet of 40 tractor/trailer units to supplement common carrier service. If rail service is discontinued, Meinerz will lose certain customers who can receive shipments only by rail. For example, during 1979-1980 it sold over $18.6 million of products to the U. S. Government under contracts which require rail delivery. Meinerz also needs rail service to receive a particular type of fuel oil used to operate its plant when natural gas supplies are low. This high viscosity oil must be heated in transit. Meinerz would incur an addditional annual cost of more than $49,000 in moving this oil by truck.

Farmers' Feed & Grain, at Riceville, sells grain, feed, seed, fertilizer and chemicals, stores grain, grinds and mixes livestock feed, and applies fertilizer and chemicals on farm lands. Farmers had gross sales in 1980 of $8.7 million, of which $7 million was derived from grain, $1 million from fertilizer, and $0.5 million from feed. Most of its anhydrous ammonia and liquid fertilizer is moved by truck as is some of its dry fertilizers. Rail is used primarily to ship dry fertilizer to Riceville from sources in Canada, New Mexico, Florida and

the Carolinas, and to ship grain to various points in Iowa, Minnesota and Wisconsin and to Chicago, IL and ports on the Gulf of Mexico. During 1980 Farmers handled some 2 million bushels of grain, 5,000 tons of fertilizer, and 1,500 tons of feed. Of the fertilizer, almost 1,800 tons, or about 36 percent, moved by rail, a total of 19 cars. Outbound, Farmers shipped 363 cars of corn and soybeans. According to its president, it would have shipped an additional 150 cars in 1980 if CNW had supplied the cars, but there was no evidence that these cars were actually ordered. The witness estimated that 500 hopper cars could be used to ship grain in 1981 if cars were made available. During the first four months of 1981 about 76 hopper cars were actually loaded and about 40 boxcars. According to this witness, failure to use more rail cars is attributable to poor service on the part of CNW. Sales of grain are made prior to harvesting and prices include an element to reflect transportation charges. If sales are contracted for rail delivery and rail service is not available when delivery is made, Farmers incurs penalty charges for failure to deliver on time or by rail. According to this witness, also, Farmers would incur additional charges and costs of $12 per ton on potash if abandonment of the Line prevents direct rail transportation of potash from Canada sources. Added trucking cost would be $6 per ton, and another $6 would result from loss of the favorable exchange rate, United States vis-a-vis Canada, if purchases of potash have to be made at United States sources, such as Waterloo, IA. This witness also testified that Farmers and other fertilizer dealers in the area service only a 12-mile radius, that fertilizer application per acre of corn in the area is about 400 tons per year, that on this basis the area adjacent to the Line consumes between 275,000 and 300,000 tons of fertilizer a year, and that, consequently, the almost 70,000 tons of fertilizer handled on the Line in 1979 constituted almost 25 percent of all fertilizer consumed in this market. Farmers contends, also, that available motor carriers in the area authorized and able to transport grain are unable to handle the traffic if the Line is abandoned.

Andersen's, at Alta Vista, sells fertilizer, feeds and grain. Its business is 50 percent grain sales and 30 percent fertilizer. It commenced operations in December 1979 and during 1980 handled 720,000 bushels of grain and 2,500 tons of fertilizer. Its rail traffic in that year consisted of 15 inbound cars of fertilizer and 24 outbound cars of corn. During that year Andersen could have shipped 60 additional cars of grain and ordered at least 40 cars that CNW did not supply. As a result, Andersen incurred some $1,860 in additional interest charges on its grain. In 1981 Andersen estimates that it could load 155 cars of grain to various destinations. If the Line is abandoned, it would have to spend $100,000 to modify its facility to handle all truck transportation and would consider relocating the facility.

C&H is a retailer of general farm supplies at New Hampton. During 1980 C&H received 40 cars containing 4,000 tons of phosphates, potash and urea. Other products move primarily by truck. Its gross sales in 1980 were about $1 million. The railroad's records show that C&H received 13 cars in 1979 and 11 cars in 1978. If the Line is abandoned C&H will have to spend $60,000 to modify its facility to accommodate increased truck transportation.

Custom is a retailer of fertilizers, chemicals and seed at Riceville. Its gross sales were $2 million in 1980. Fertilizer sales constitute about 75 percent of its business. All of its liquid fertilizer and about 10 percent of its dry fertilizer moves by truck. The bulk of its dry fertilizer moves by rail from sources in Canada and Florida. During 1980 Custom received 49 cars of fertilizer. Custom competes with dealers who have rail service on another railroad, and expects to be at a competitive disadvanage if this Line is abandoned.

Farm-Coop is a dealer in fertilizer and grain, among other products, at Fredericksburg. Grain and fertilizer constitute about 70 percent of its business. During 1980 Farm-Coop handled 2.8 million bushels of grain and 9,000 tons of fertilizer. About 5,000 tons of fertilizer, 50 cars, were received by rail. However, of its grain only about 81,000 bushels moved by rail. Custom contends that it would have shipped an additional 200 cars of grain in 1980 if CNW had supplied the cars, but the railroad's records show that Custom ordered only 58 cars that year and that 46 cars were placed. This shipper estimates that if cars are made available it would ship 250 cars of corn to Gulf of Mexico ports in 1981. If this Line is abandoned Custom would have to increase its fertilizer prices to customers, and would have to spend $75,000 to modify its facilities to accommodate increased truck transportation.

Hillandale is an egg processor at New Hampton. Hillandale purchases eggs from farmers in the area, processes the eggs, and ships the eggs by truck to various cities. About 10,000 cases of eggs a week are processed at its plant, located off-track a short distance from CNW's station at New Hampton. Its principal rail traffic consists of egg cartons shipped from points in Mississippi, Massachusetts and California. During 1980 it received 14 cars of cartons. These cars were unloaded into trucks for the short movement to Hillandale's plant. If this Line is abandoned this shipper expects increased costs of about $15,000 per year for bringing in its cartons by truck.

Maynard is a farm cooperative with facilities at Sumner and at two adjacent towns, Maynard and Randalia. It handles grain, about 50 percent of its business, and fertilizer and chemicals, about 30 percent of its business, as well as other farm products. Its rail traffic in 1980 consisted of 70 cars of fertilizer received from sources in Canada and Florida. All of its liquid fertilizer moves by truck, and in 1980 all of its grain also moved by truck. In all, in 1980, Maynard handled 7,000 tons of fertilizer and 4.4 million bushels of grain. In 1979 it shipped 50 cars of grain by rail. According to this shipper a number of other cars were ordered but not supplied by CNW, and Maynard would have shipped 200 cars of grain if cars had been supplied. In 1981 it expects to use 250 cars to ship grain to various Iowa points and the Gulf of Mexico. Presently all of its grain moves to a barge facility on the Mississippi River, and this shipper acknowledges that during most of the year the barge prices for grain are higher. If this Line is abandoned the shipper expects to have to increase its fertilizer prices to farmers.

Feed & Grain, at McIntire, sells farm supplies. About 70 percent of its business is the sale of grain, more than 1 million bushels in 1980. Rail traffic in grain was 80 cars, about 20 percent of this shipper's grain, and the remainder moved by truck. According to this shipper it could have shipped an additional 200 cars of grain in 1980, but the railroad failed to supply the cars despite repeated orders for cars. If cars are made available in 1981 the shipper expects to use 200 cars to move grain to various points. It handled 1,500 tons of fertilizer in 1980. Of this, 200 tons of potash, in 2 cars, were received by rail. If this Line is abandoned Feed & Grain will have to spend $60,000 to modify its facility to handle more truck traffic.

Schult sells grain and farm supplies at Sumner. In 1980 it handled 400,000 bushels of grain, 2,000 tons of feed, and 250 tons of fertilizer. Rail traffic in 1980 was 75 cars of grain outbound and 6 cars of fertilizer and other products inbound. Schult would have shipped an additional 40 to 50 cars of grain in 1980 if CNW had supplied the additional cars, cars ordered on 10 to 12 occasions but never supplied. Schult projects a need for 100 cars in 1981 to ship grain, but as of May 1981 had ordered only 2 or 3 cars. Schult anticipates additional costs to augment its truck receiving facilities if this Line is abandoned.

Butter & Dairy is a farm cooperative located off-rail in Fredericksburg. It has 500 farmer members, and gross sales in 1980 of $32 million. During 1980 it processed 113 million pounds of raw milk, and shipped by rail 5 million pounds of dry milk powder, 55 cars, almost all of which moved for the U. S. government. About 70 percent of its outbound traffic moves by truck. During 1980 it could have shipped an additional 12 cars of dry milk powder if cars ordered had been supplied by CNW. It expects to ship 90 cars in 1981 if cars are made available.

Elevator is engaged in the sale of grain, fertilizer and feed at facilities in Westgate and Oelwein. During 1980 Elevator handled 1.7 million bushels of grain at Westgate and 1,000 tons of fertilizer. In that year it received 4 cars of fertilizer and shipped out 148 cars of grain. It would have used an additional 40 cars for grain that year if cars ordered had been supplied by CNW. In 1981 it would use 190 cars for grain to various destinations if CNW would supply the cars. Its fertilizer business is primarily at its plant located off-rail in Oelwein. At that point inbound cars of fertilizer are transloaded at the railhead to trucks for movement to its plant. If the Line is abandoned Elevator "will pay less to the farmers for grain."

Wayne, a retailer of grain, fertilizer and feed, is a new business located off-rail in Sumner. During the last 4 months of 1980 Wayne handled 250,000 bushels of grain, 300 tons of fertilizer, and 600 tons of feed. Its total rail traffic during that period was 1 carload of potash. About 90 percent of its fertilizer moves by truck and as yet it has shipped no grain by rail. It has recently expanded by purchasing another grain handling company in Sumner.

Prospectively, it expects to use up to 12 cars a year for moving grain, and if rail service is dependable an additional 30 cars for grain and up to 30 cars for fertilizer. As noted, Wayne has no direct loading facility on the Line and must transload shipments to and from its plant. It anticipates, however, that much of the grain purchased from farmers would be delivered directly to the railhead. The effect of abandonment on this shipper is not apparent, since it expects to hire additional employees regardless of the outcome of this proceeding.

Equity is engaged at Elma in the mixing and blending of fertilizer and feed and in the storage and sale of grain. It is a farm cooperative, and 75 percent of its business is in the sale of grain and fertilizer. Its principal use of rail is in the movement of fertilizer, 36 cars in 1980, and in the shipping of grain, 7 cars in 1980. In the latter regard, this shipper alleges that it would have shipped an additional 75 cars of grain in 1980 if CNW had supplied the cars, and if cars are available in 1981 it would ship 285 cars of grain to Chicago and Gulf of Mexico ports. That projection is based on the witness' belief that if rail service is assured and is responsive to Equity's needs it could pay farmers 10 to 15 cents more per bushel and thus secure grain that is now merchandised elsewhere. Most of the year Equity gets a higher price for its rail-shipped grain, but when the barges are operating on the Mississippi River the rail and truck prices at the river ports are competitive.

Sara Lee, a division of Consolidated Foods Corporation, ships bakery products nationwide from its plants at Deerfield, IL and as here pertinent, New Hampton. Each plant bakes different products. Sara Lee is, or has been, a major shipper on the Line. In 1973, its first full year of operation at New Hampton, Sara Lee moved 37.7 percent of all traffic by rail, including 52.7 percent of its inbound traffic. By 1980 this had declined to 14.3 percent of all traffic by rail, including only 22.6 percent of inbound traffic. Outbound rail traffic in 1980 had declined to less than 1 percent of all its outbound traffic. Its inbound traffic consists of ingredients for its baked products, flour, sugar, and strawberries. Additionally, Sara Lee uses more than 100 tons a day of carbon dioxide (CO_2) as a coolant to quick freeze bakery products as they come out of the ovens. Outbound Sara Lee ships primarily frozen bakery products. Its transportation expense, outbound only, in 1980 was in excess of $15 million. Inbound, for rail transportation of food products, Sara Lee had a transportation expense in 1980 of more than $250,000, and spent more than $117,000 for the inbound transportation of CO_2 in 1980-1979. Its gross sales in 1980 ranged up to $300 million.

Sara Lee alleges that abandonment of the Line would have serious adverse effects on Sara Lee. At current rates, substituted motor carrier costs for its annual inbound transportation expense are estimated to exceed rail costs by more than $140,000. The loss of rail service will also increase the burden on Sara Lee's bulk receiving facilities and storage facilities. Sara Lee estimates that it takes two trucks to haul the same amount of flour as one rail car, and four trucks for one rail car of sugar or CO_2. To accommodate increased truck transportation Sara Lee would have to construct an additional truck receiving bay at an estimated cost of up to $200,000. To maintain quality control of its raw ingredients Sara Lee must segregate incoming shipments of raw materials, and as the number of truck shipments increases Sara Lee would incur annual additional labor expense for this purpose of about $23,000 and an additional capital expense of $16,000 to modify systems control in its computers. Sara Lee presently receives a substantial volume of inbound materials by truck; annually more than 600,000 pounds of strawberries, 17 million pounds of carbon dioxide, and 1.5 million pounds of flour. A substantial increase in inbound trucks is expected to increase congestion at the plant and result in increased truck detention charges by about $20,000 annually. As noted, also, Sara Lee uses a substantial volume of CO_2; an interruption in its supply of CO_2, in fact, will immediately shut down its baking operation. At most times it has on hand only enough CO_2 for two days' production. If Sara Lee becomes totally dependent upon truck transportation of this commodity, it will have to increase its on-site CO_2 storage facilities because it believes that, because of weather conditions and other reasons, truck service is less reliable than rail service. Additional CO_2 storage would require a capital outlay of $200,000 and annual additional labor costs.

It this Line is not abandoned, on the other hand, and if CNW provides "prompt and reliable" service, Sara Lee projects increased rail inbound traffic, a volume in 1981 of more than 6.7 million pounds of flour, 9.4 million pounds of sugar, 1.6 million pounds of strawberries, and 14 million pounds of CO_2, an aggregate of more than 32 million pounds, requiring 242 rail cars.

The evidence shows that the Line is intersected at New Hampton by a line of the Milwaukee Railroad at a point about 4,400 feet from the Sara Lee plant. An official of Sara Lee contacted the Milwaukee to determine whether that railroad is interested in extending its service to Sara Lee. He was subsequently informed that Sara Lee's traffic would not provide the Milwaukee with sufficient revenues to justify the purchase of the 4,400 feet of line, at an estimated cost, according to CNW, of about $55,000. On cross-examination Sara Lee's director of operations at New Hampton was asked whether, if this Line is abandoned, Sara Lee would consider purchasing this 4,400 feet of track and right-of-way in order to maintain its rail connections by way of the Milwaukee Railroad. According to this official, however, "Our company's position at this point in time is we are not interested in doing business with a bankrupt railroad."

APPENDIX E

PROTESTANT MINNESOTA SHIPPERS

Brownsdale is an 800-member, farm cooperative locatdd at Brownsdale, MN with a fertilizer blending plant on the Line at Waltham. Brownsdale had gross sales in 1980 of $9.2 million, up from $8 million in 1979 and 1978. The sale of fertilizer, here pertinent, constitutes 15 percent of its business. Annually Brownsdale receives more than 4,000 tons of fertilizers, including potash, phosphate, urea and anhydrous ammonia. In 1978, 22 cars of fertilizer went to Waltham and 29 cars to the main plant at Brownsdale, and in 1979 the Waltham facility received 11 cars and the Brownsdale plant 32 cars. The plant at Brownsdale had been on a line of the Milwaukee Railroad, but in mid-1980 that line was abandoned by the Milwaukee and the plant no longer has rail service. In 1980, 32 cars of fertilizer were shipped to the Waltham plant and 2 cars to Brownsdale. This shipper anticipates the same volume of fertilizer traffic in 1981, with all of the cars going to Waltham. Ammonia and all other traffic of Brownsdale now moves by truck. In the transportation of fertilizer, one rail car is the equivalent in volume of five trucks for this shipper. If Brownsdale receives by truck all of the fertilizer now moving by rail, according to this shipper, transportation costs for fertilizer would increase by about $8 per ton, or about 2.1 percent of its annual fertilizer sales volume. Also, this shipper states that seasonal weight restrictions on local roads would impede the transportation of fertilizer by truck on a year-round basis.

Mower is a farm cooperative with up to 1,000 farmer-members. Its principal facility is on the Line at Sargeant, but it has other facilities at Waltham and on a line of the Milwaukee Railroad at Adams, MN. At Sargeant it sells various farm supplies, and as here pertinent fertilizers. Mower's gross sales in 1980 were about $5 million, of which about 45 percent was attributable to the facility at Sargeant. Of the sales volume at Sargeant, about $1 million was directly dependent upon rail shipments of fertilizer products. In 1980 Mower received 30 cars of potash, phosphate and anhydrous ammonia from various sources, a slight decline from 34 cars in 1979. An intensive sales campaign is underway, and Mower expects to receive increased volumes of fertilizer, up to 33 cars by rail in 1981. According to Mower, it takes about 5 trucks to haul the equivalent of one rail car, and it costs $8 to $10 more per ton to ship fertilizer by truck than by rail. It contends that road weight restrictions and a shortage during peak fertilizer movement seasons of qualified motor carriers would make it difficult to receive its fertilizer if this Line is abandoned, and impose economic hardship on its farmer members.

Reese is a retailer of agricultural supplies at Hayfield. As here pertinent, Reese sells fertilizer which accounts for about 25 percent of gross annual sales, more than $2 million in 1980, Reese receives rail shipments of potash from Canada and phosphates from Florida. Prior to 1979 Reese also received anhydrous ammonia by rail, but these shipments now move by truck as do shipments of other products, such as chemicals. In 1980 Reese received 32 cars of fertilizers, in 1979 33 cars, and in 1978 19 cars. It expects a small increase in traffic in 1981. Based on current transportation rates, Reese estimates that movement by truck of its present rail traffic would increase its costs by $6 to $7 per ton. If regular rail service were assured, this shipper states that it would also ship its grain by rail, grain that now moves by truck.

Century manufactures corrugated drainage tubing at Hayfield. For use in its manufacturing process Century receives rail shipments of polyethylene pellets from sources in Texas and Louisiana. In 1978 Century received 18 cars of pellets, 21 cars in 1979, and 27 cars in 1980. Most of its outbound shipments of finished tubing go to distributors in the Midwest by truck. However, to one distributor in Utah Century ships by rail, 9 cars in 1978, 7 cars in 1979, and 9 cars in 1980. In 1981 Century estimates that it will receive 27 cars of pellets and ship 10 cars of tubing to the Utah distributor. This shipper's economic survival is dependent upon the continued delivery of polyethelene pellets at reasonable cost. Trucks can carry only 22 tons of pellets as opposed to 90 tons that can be carried in a rail car. According to Century, the cost to transport pellets by truck would be prohibitive, as much as $80,000 per year more than rail transportation. If this Line is abandoned Century would have to consider relocating its plant. The railroad concedes that Century's transportation costs would be increased by this abandonment, but differs in the amount of the increase and in the options available to this shipper.

Farmers Coop, at Hayfield, is a farm supply cooperative with about 800 farmer members. It deals in various farm supplies, including as here pertinent fertilizers. Most of its fertilizer moves inbound by rail. In 1978 it received 57 cars of potash, phosphate, urea, and anhydrous ammonia, in 1979 it received 31 cars, and 27 cars in 1980. During these same years its gross annual sales increased from $2.3 million in 1978, to $2.7 million in 1979, to $3.2 million in 1980. Sales of fertilizer constitute about 35 percent of its gross sales. Despite an annual decline in its rail carload shipments of fertilizer, Farmers Coop projects a need for 35 cars of fertilizer in 1981. This shipper estimates that the cost of receiving its fertilizer by truck would be as much as 30 percent higher than the cost of rail movement. Moreover, its storage facilities are not well suited to receive truck shipments of fertilizer, and seasonal weight restrictions on the roads prevent trucks from being effectively used to carry fertilizer.

Huntting, at Hayfield, is a branch of a 13-branch dealer, based at Austin, MN, engaged in the sale of grain, seed, feed and agricultural supplies. At Hayfield Huntting stores and ships grain. Up to 20 percent of its grain moves by rail, the remainder by truck. In 1978 Huntting shipped 50 cars of grain, 57 cars in 1979, and 20 cars in 1980. About 20 cars of grain are projected for 1981. Rail carloads of grain go to points in Texas, Louisiana and Wisconsin, as well as to Duluth, MN. Some of its grain moves by truck to barge facilities on the Mississippi River, and during the navigational season Huntting finds such movements to be more profitable than rail movements to other points.

Hayfield Lumber sells building materials and coal at Hayfield. Its building materials, which constitute 80 percent of its business, all move by truck, but its coal comes in by rail and is unloaded over conveyer belts that carry the coal to storage bins. The design and construction of its coal receiving facility makes it impossible to receive coal by truck, and according to this shipper the cost of modifying this facility to permit inbound shipments of coal by truck would be prohibitive. If Hayfield Lumber because of this abandonment is unable to have coal delivered by rail, it will be forced to discontinue the sale of coal. It sells its coal to individuals for home heating purposes, and is the only coal dealer within a 70 to 80 mile radius. It received 5 cars of coal in 1980 and projects 6 to 7 cars of coal in 1981.

Sargeant Grain has a feed mill, a grain elevator, and corn storage bins on the Line at Sargeant. It has annual sales in excess of $5 million, attributable 80 percent to grain and 20 percent to feed. It is concerned here with turkey litter, comprising less than half of one percent of its business. It discontinued use of rail for its grain several years ago and it all moves by truck now. But it does receive an occasional rail shipment of pitch, peat moss and rice hulls used as turkey litter. There were three such carloads in 1980 and 1979, and one car in 1978. Sargeant Grain describes itself as "not a substantial user of rail service."

Midland is a farm cooperative, one of an association of more than 200 cooperatives with headquarters at Minneapolis, MN. At Hayfield, in a plant that commenced operations in 1980, Midland manufactures liquid fertilizer. By rail, this plant receives potash from Canada, phosphate from Florida, and phosphoric acid from North Carolina, all used in the manufacture of liquid fertilizer. In 1980 Midland received 29 cars of dry fertilizer and phosphoric acid, and in 1981 it expects to receive 50 cars, 35 cars of phosphoric acid and 15 cars of dry fertilizer. According to Midland, the cost of shipping phosphoric acid by truck is about four times more expensive than by rail, and dry fertilizer by truck costs about $6 to $7 more per ton by truck than by rail. The phosphoric acid moves in special, rubber-lined cars, and is shipped at a temperature of about 175 degrees. If it cools to under 100 degrees it will cake and will be unusable. At the Hayfield plant it must be mixed with anhydrous ammonia and water to be unloaded and stored. For this reason it cannot feasibly be transloaded from rail to truck without losing too much heat in the process. The Midland group of cooperatives owns a substantial fleet of motor vehicles as well as a barge line. It also owns a company that is one of the largest producers of fertilizer in the country.

Nelson's Gas at Hayfield, as here pertinent, sells liquid propane gas. Sales of gas account for about 75 percent of its gross sales, about $500,000 in 1980. All of its gas originates in Canada and moves via pipeline to Mankato, MN, and is hauled by truck to Nelson's facility at Hayfield. However, in the fall and winter, when large quantities of gas are used by farmers to dry corn, the pipeline company

allocates its gas and Nelson cannot obtain all its needs. At these times it uses rail service to ship additional gas to supply its customers' needs. In 1978 it received 18 carloads of gas, 6 cars in 1979, and only 2 cars in 1980.

Power Span is a manufacturer of pre-stressed concrete poles for use in electrical power transmission. These concrete poles range in length from 40 to 92 feet and weigh between 6,000 and 25,000 pounds. The poles are manufactured by Power Span at Hayfield in a plant specifically and uniquely constructed to manufacture such poles. The plant was built in 1976, operated intermittently by its former owner, and closed down in February 1979. Power Span bought the plant in August 1979 and commenced operations in June 1980. Power Span is the largest employer in the Hayfield area. Its gross sales in 1980 exceeded $1.6 million, but it did not make a profit. Substantial sales of its product did not commence until late 1980 and early 1981. Between June 1980 and March 1981 Power Span shipped 54 carloads of poles, upwards of 200 poles aggregating more than 4.6 million pounds. Additional carloads of poles were scheduled under contract to be delivered during the first quarter of 1981, and Power Span has commitments to ship more than 140 cars of poles to various utilities during the remainder of 1981. Power Span projects a total of more than 230 carloads of poles to be shipped during 1981. Rail freight charges in 1981 are expected to approach $1 million, and to exceed $2 million by 1983. About 20 percent of its total sales revenues are expended for rail freight charges.

Most of Power Span's poles, about 90 percent, are longer than 70 feet. The movement by truck of poles more than 45 feet long presents difficulties. They are considered over-length in every state, and the movements are subject to various restrictions, including special permits, escort cars, daylight hours, and others. By truck the poles move on expandible trailers, usually in short supply. In fact, the varying weight and length restrictions on the highways make it virtually impossible to move the poles by truck beyond a radius of about 100 miles, although on rush orders and in special circumstances Power Span has made truck shipments and absorbed the difference in shipping costs, which are so high by truck as to eliminate this mode as a realistic option. As Power Span puts it, trucks are just not suited to haul poles which may be over nine stories high and weigh over 12 tons.

Power Span is now in the preliminary stages of bidding on new jobs which would entail, if successfully completed, the delivery over a period of years of as many as 7,000 poles ranging in length from 85 to 110 feet each, and requiring up to 1,200 rail cars for movement to various utilities in Colorado, New Mexico, Oklahoma, Kansas, Texas and the Carolinas. For this business, it contends, it requires continued rail service from Hayfield.

APPENDIX F

Chicago and North Western Transportation Company
Oelwein, Iowa to Randolph, Minnesota
Revenue and Cost Data
for the Base Year
8/1/79 to 7/31/80
and for a projected Subsidy Year

	Base Year	Subsidy Year 1/
Revenues Attributable For:		
1. Freight orig. and/or term.	$1,420,566	$1,623,115
2. Bridge traffic	7,304,281 2/	7,304,281 2/
3. All other revenues	28,242	29,654
4. Total revenues	8,753,089	8,957,050
Avoidable Costs For:		
5. On-Branch costs	957,874	1,275,954
6. Off-Branch costs	665,200	760,046
7. Overhead costs	3,597,167 3/	3,597,167 3/
8. Total avoidable costs	5,220,241	5,633,167
Avoidable Loss:		
9. a) Avoidable loss (Gain) from operations	(3,537,691)	(3,328,726)
b) Opportunity costs	1,016,191 4/	—
c) Total avoidable loss (gain)	(2,521,500)	(3,328,726)
Subsidization Costs For:		
10. Rehabilitation	—	—
11. Administrative costs	—	16,528
12. Casualty reserve account	—	—
13. Total subsidization costs	—	16,528
Return On Value For:		
14. a) Valuation of property	—	10,978,472
b) Working capital	—	51,687
c) Income tax benefit	—	—
d) Net liquidation value	—	10,926,785
15. Rate of return	—	12.1 percent 5/
16. Total return on value	—	1,328,395
Estimated Subsidy:		
17. Estimated subsidy	—	1,978,990

1/ Year ending July 31, 1981.
2/ Five-twelfths of 1979 overhead revenue added to overhead revenues for seven months of 1980.
3/ Five-twelfths of the average of 1979 replacement and historical costs added to the average of these costs for seven months of 1980.
4/ Net liquidation value of $10,926,785 multiplied by 9.3 percent.
5/ Railroad industry's current after-tax cost of capital.

BEFORE THE

INTERSTATE COMMERCE COMMISSION

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY --- ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA	)))	Docket No. AB-1 (Sub-No. 113F)

APPEAL OF PROTESTANTS, MINNESOTA SHIPPERS GROUP, FROM INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE PAUL J. CLERMAN, SERVED JULY 15, 1981

BROWNSDALE COOPERATIVE ASSOCIATION
CENTURY PLASTICS, INC.
FARMERS COOPERATIVE OIL ASSOCIATION
HAYFIELD DEVELOPMENT CORPORATION
HAYFIELD LUMBER COMPANY
HUNTTING ELEVATOR COMPANY, INC.
MIDLAND COOPERATIVES, INC.
MOWER COUNTY SERVICE COMPANY
NELSON'S GAS, INC.
POWER SPAN, INC.
REESE FARM CENTER, INC.
SARGEANT GRAIN COMPANY

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Due Date: August 4, 1981

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BEFORE THE

INTERSTATE COMMERCE COMMISSION

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY --- ABANDONMENT BETWEEN OELWEIN, IOWA AND RANDOLPH, MINNESOTA	)))	Docket No. AB-1 (Sub-No. 113F)

APPEAL OF PROTESTANTS, MINNESOTA SHIPPERS GROUP, FROM INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE PAUL J. CLERMAN, SERVED JULY 15, 1981

STATEMENT OF THE CASE

On January 30, 1981, Chicago and North Western Transportation Company (C&NW) filed an application for authority to abandon its line between Oelwein, Iowa and Randolph, Minnesota, a distance of 144.8 miles.[1]

Brownsdale Cooperative Association, et al. (the Minnesota Shippers Group filing this appeal) opposed abandonment of a 19.2-mile segment of the line between Dodge Center and Sargeant, Minnesota (Milepost Nos. 442.0-457.2), and between Hayfield and Waltham, Minnesota (Milepost Nos. 1.2-5.2). The Iowa Department of Transportation opposed abandonment of the 65.2 miles of line located in Iowa. A group of Iowa shippers opposed the entire application.

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[1] A 1.8-mile segment of track at Dodge Center, Minnesota is excluded from the abandonment. At that point, C&NW's Oelwein-Randolph line connects with C&NW's east-west line between Mankato and Minnesota City, Minnesota.

Other opposition to the application was not implemented by evidence or briefs.

A hearing on the application was held at Oelwein, Iowa between May 5 and May 8, 1981, before Administrative Law Judge (ALJ) Paul J. Clerman.

In an initial decision served July 15, 1981, ALJ Clerman found that the application should be granted in full.

ALJ Clerman's findings were published in the Federal Register of July 15, 1981.

On July 24, 1981, an offer of financial assistance for continued operation of the 19.2-mile Dodge Center-Sargeant and Hayfield-Waltham segment was filed in behalf of some of the companies belonging to the Minnesota Shippers Group.[2]

Administrative appeals of the initial decision may be filed on or before August 4, 1981. 49 CFR § 1121.36(e)(3)(iii) (interim).

GOVERNING STANDARDS AND PROCEDURES

This appeal is governed by the appellate proce-

[2] It was made clear in that offer, however, that the offerors intended to pursue their administrative remedy with respect to the merits of the initial decision as to the 19.2-mile segment, and, if necessary and appropriate, their judicial remedy in that respect, as well. Filing of the offer at that time was necessitated by the 10-day deadline of 49 USC § 10905(c) in view of the Commission's practice of publishing the findings of the initial decision in the Federal Register as if they constituted final Commission findings in the matter. The companies filing that offer are willing to subsidize continued operation of that segment only if and when it is lawfully determined that abandonment of that segment is permitted by public convenience and necessity.

dures of 49 CFR § 1121.36(e), adopted on an interim basis on November 25, 1980, Abandonment of Railroad Lines and Discontinuance of Service, Ex Parte No. 274 (Sub-No. 6), 45 FR 78144, 78148. Those procedures are designed to implement 49 USC § 10904(c)(3), which provides, in pertinent part, as follows:

> "Thirty days after such decision, the initial decision (in an investigated abandonment case) shall become the final decision of the Commission unless, during the interim, the Commission decides to hear appeals."

Pursuant to 49 CFR § 1121.36(e)(2) (interim), an appeal of an initial decision in an abandonment case will be heard only if the Commission finds either of the following:

(i) the action involves a matter of general transportation importance, or

(ii) the action would be affected materially because of new evidence, changed circumstances, or material error.

SCOPE OF APPEAL

This appeal seeks reversal of that portion of the initial decision by which abandonment of the 19.2-mile Minnesota line segment was authorized. The Commission's authority to permit abandonment less extensive than that requested is evident in the governing statute, 49 USC § 10903(b)(1). See Norfolk S. Ry. Co. Abandonment, 282 ICC 376, 387 (1952).

MATTER APPEALED

The initial decision denied the requested retention of rail service on the 19.2-mile Minnesota line segment in terse and summary fashion, without attempting to differentiate it from other proposals for partial abandonment, viz. (initial decision, sheet 23):

> "As earlier stated, several alternate proposals for partial abandonment were offered by protestants. None of these proposals were (sic) drawn with sufficient detail to permit comprehensive analysis as to profitability, and each relied upon traffic projections made by the shippers. Based upon actual traffic and revenue data of record, none of these alternate proposals gave promise of sufficient revenues to overcome all pertinent expenses, including opportunity costs, so as to produce net revenues. Contrary to the position taken by protestants, the burden of proving the viability of suggested alternatives to abandonment, such as partial abandonment, is upon protestants (citations omitted). Protestants have failed to sustain that burden."

It is not disputed that protesting local interests have the burden of going forward with the evidence as to the propriety of retention of rail service on any segment comprising less than the entire line proposed for abandonment, but it is strenuously disputed that such burden was not sustained as to the 19.2-mile Minnesota line segment.

The ultimate finding of the initial decision that the burden of proof was not sustained as to retention of rail service on the 19.2-mile Minnesota line segment is

based upon three subsidiary findings, i.e.:

1. that evidence with respect to such retention of rail service is not sufficiently detailed to permit comprehensive analysis as to profitability;

2. that such evidence relies upon traffic projections made by shippers; and

3. that based on actual (i.e., historical) traffic and revenues, continuation of rail service on the segment would not likely result in a full opportunity cost rate of return for C&NW.

As will be shown, the first two of those subsidiary findings, which were treated in the same sentence of the initial decision, are materially erroneous as a matter of fact as applied to retention of rail service on the 19.2-mile Minnesota line segment. The appeal should be heard to correct such obviously erroneous findings of fact. 49 CFR § 1121.36(e)(2)(ii) (interim).

It is apparent, however, that the real basis for the initial decision's rejection of the requested retention of rail service on the 19.2-mile Minnesota line segment is its finding that such operation would not result in a full return of opportunity costs. That determination is the first to our knowledge that opportunity costs alone warrant abandonment of a line segment. As will be shown, that determination raises very serious questions under the governing statute which constitute a matter of general transportation importance. Such questions should be resolved in this appeal. 49 CFR § 1121.36(e)(2)(i) (interim).

ARGUMENT IN SUPPORT OF APPEAL

I. THE EVIDENCE IN SUPPORT OF RETENTION OF RAIL SERVICE ON THE 19.2-MILE MINNESOTA LINE SEGMENT ADEQUATELY REFLECTS THE PROFITABILITY OF THAT SEGMENT WITHOUT RELYING ON SHIPPERS' TRAFFIC PROJECTIONS.

The evidence with respect to the likely future profitability of the 19.2-mile Minnesota line segment was presented by Mr. George C. Shaffer, an expert transportation consultant retained by the Minnesota Shippers Group. It is critical to observe that Mr. Shaffer's testimony regarding such profitability was not attempted to be rebutted by C&NW in any respect, nor were his expert qualifications subjected to any challenge.

Contrary to the finding of the initial decision, Mr. Shaffer's evidence did not rely exclusively, or even primarily, upon traffic projections made by shippers. Mr. Shaffer's evidence showed that the 19.2-mile Minnesota line segment was profitably operated in the base year (12 months ended July 31, 1980) on the basis of C&NW's own evidence of actual revenues and costs for that period (Ex. 18a, p. 9, Ex. GCS-6).[3]

As noted, the initial decision also found that the evidence in support of retention of service on the 19.2-mile Minnesota line segment was not sufficiently detailed to per-

[3]Mr. Shaffer made a minor correction to C&NW's base year off-branch costs because of C&NW's failure to have followed the Commission's abandonment costing regulations in one specific respect (Ex. 18, pp. 11-12).

mit comprehensive analysis as to profitability. The record shows the contrary, as indicated below, but it should be noted that such a broad, negative finding is so vague as to be meaningless, and is clearly not a valid basis upon which to predicate a determination that the burden of proof was not sustained. The finding does not identify any purported defect(s) in the evidence --- e.g., "not sufficiently detailed" as to revenues, as to off-branch costs, as to on-branch costs. The finding is legally deficient because its meaning cannot be determined so as to measure its consistency with the record. Cf. United States v. Chicago, Milwaukee, St. Paul and Pacific Railroad Company, 294 U.S. 499, 510-511 (1935).

The primary source of the evidence that operation of the Minnesota line segment was profitable in the base year is C&NW's own evidence and workpapers. Protestants' Witness Shaffer's calculation of the base year profitability of operation of that segment utilized actual C&NW revenues (Ex. 18, p. 14) and off-branch costs (id, pp. 11-12; see footnote 2, supra) of the traffic actually originating or terminating on that line segment in that year. Mr. Shaffer also used C&NW's own evidence of on-branch costs in order to allocate such costs to the traffic originating or terminating on the segment on the basis of that traffic's gross ton-miles (maintenance of way), crew and locomotive time (transportation and maintenance of equipment), and car-miles and car-days (freight car costs) (Ex. 18, p. 13). The end

result was a detailed showing of likely profitability if the 19.2-mile Minnesota line segment had been operated during the base year without the remainder of the line proposed for abandonment.

The evidence relating to the profitability of the Minnesota line segment was developed in accordance with Commission precedent on the subject. For example, in Norfolk S. Ry. Co. Abandonment, supra, in considering the propriety of a partial abandonment, the Commission said (282 ICC, at p. 386):

> "The financial results of operation can be estimated for each of the segments mentioned above by apportioning the expenses of operation according to their respective shares of the actual costs and average mileage bases shown for the line, and allocating shares of the total system revenues according to the traffic handled by each."

Indeed, the Commission has partially denied abandonments on the basis of evidence as to profitability of segments which was considerably less detailed and precise than the evidence as to profitability of the Minnesota line segment involved in this case. See, e.g., Baltimore and Annapolis R. Co. Abandonment, 348 ICC 678, 696-703 (1976); Chicago & N.W. Ry. Co. Abandonment, 317 ICC 207, 208-213 (1961); Norfolk S. Ry. Co. Abandonment, supra.

It follows that the initial decision erred materially in finding that the evidence lacked sufficient detail to permit adequate analysis of the profitability of the

Minnesota line segment, and that such evidence relied upon shippers' traffic projections. The Commission should find on appeal that evidence as to profitability of that segment was detailed, unrebutted and in accordance with Commission precedent, and that such evidence supports retention of rail service on that segment.

II. THAT CONTINUED OPERATION OF THE MINNESOTA LINE SEGMENT WOULD NOT RESULT IN FULL RECOVERY OF C&NW'S OPPORTUNITY COST AS TO THAT SEGMENT CANNOT ALONE WARRANT ABANDONMENT OF THAT SEGMENT.

The initial decision correctly found that it had not been shown that the profit from operating the Minnesota line segment in the base year would result in full recovery of C&NW's opportunity cost as to that segment.[4] However, the initial decision determined on that basis alone that retention of rail service on that segment was not shown to

[4]The unrebutted evidence showed a base year operating profit for the Minnesota line segment of $64,872 (Ex. 18a, p. 9, Ex. GCS-6), which provides a rate of return of 3.7 percent on the estimated net liquidation value of the segment ($1,739,848), as adjusted to account for the findings of the initial decision as to the values of reusable rail (see initial decision, sheets 10 and 19, and Ex. 18, p. 15, Ex. GCS-4, p. 2). Recent Commission decisions have indicated that a rate of return of 9.3 percent of net liquidation value is necessary to avoid incurrence of an opportunity cost with respect to any line segment. Illinois Central Gulf R. Co. Abandonment, 363 ICC 729, 733-734 (1980); Texas and Pacific Railway Company Abandonment, 363 ICC 666, 673-675 (1980).

be "viable," warranting abandonment of the segment.[5] The action of the initial decision in that respect involves an issue of general transportation importance, i.e., whether or not abandonment may be lawfully authorized solely on the basis that continued operation of a line would not result in full recovery of opportunity cost.

The action of the initial decision on that issue is directly at odds with the determination of the Court in City of Cherokee v. ICC, 641 F.2d 1220 (8th Cir., 1981). In that case, the Court framed the opportunity cost issue in terms of the differing findings of the administrative law judge (ALJ) and the Commission thereon, viz. (641 F.2d, at p. 1229):

> "The ALJ recognized that if the line were abandoned and all the properties sold, the money thereby realized could be invested in a more lucrative market, and ICG would realize a significant return on its capital investment in the Sioux Falls District line. She did not believe, however, that this factor should necessarily be determinative of the entire case. She correctly reasoned that Congress intended this factor to be measured against the burden that abandonment would impose on the affected communities and shippers. 49 U.S.C. §§ 10903-10905 (Supp. II 1978). The Commission stated in substance that if the carrier could not operate the branch line as a profitable going concern (and

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[5] In that there was an operating profit on the segment in the base year, and there was no claim that the segment required rehabilitation to achieve FRA Class 1 minimum track safety standards, opportunity cost was clearly the sole basis for the determination that retention of rail service on the segment was not shown to be viable or, in other words, that abandonment of the segment was warranted.

> if it could turn a greater profit through abandoning the line and selling its property holdings), then abandonment would be permissible."

The Court ruled squarely in favor of the findings of the ALJ as to opportunity cost, viz. (641 F.2d, at pp. 1229-1230, emphasis added):

> "The ALJ was right and the Commission was wrong. Congress did not intend for the Commission to authorize abandonment of particular rail lines solely because the carrier's capital investment in the line could be more profitably put to work elsewhere. Congress intended that the Commission determine the degree and severity of the benefits and burdens which abandonment would occasion to all affected parties. The Commission does not have the authority to modify the measuring mechanism mandated by Congress."

There was no attempt in the initial decision in the instant case to measure the opportunity cost of continued operation of the Minnesota line segment against the burden that abandonment of that segment would impose on the affected communities and shippers.[6]

This case is also the first instance to our knowledge in which a finding of "burden on interstate commerce" from continued operation of a line segment has been predicated solely upon opportunity cost (i.e., where the line

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[6] There was extensive evidence that abandonment of the Minnesota line segment would have a very severe adverse effect on the protesting local shippers because of the inadequacy of motor carriage as alternative transportation (e.g., Ex. 18, p. 35, pp. 124-134). The initial decision acknowledged that evidence (sheet 13 and Appendix E, page 3), but it failed to give any consideration to it in weighing the benefits and burdens associated with continued operation of that segment.

produces an operating profit and needs no rehabilitation - see footnote 5, supra). It is highly questionable whether or not such a determination comports with the governing statute. Opportunity cost, as a factor in abandonment cases, was billed as an "additional argument . . . that operation of a given line is a burden on interstate commerce." Abandonment of R. Lines - Use of Opportunity Costs, 360 ICC 571 (1979), at p. 578, emphasis added. It cannot be successfully argued that Congress gave the Commission discretion to permit abandonment of any line segment solely on the ground that its operation does not result in a "reasonable" rate of return.

It follows that the finding in the initial decision to the effect that continued operation of the Minnesota line segment was not shown to be "viable," solely on the basis of the opportunity cost associated with such operation, is materially erroneous as to an issue of general transportation importance.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, for the reasons stated, it has been shown that the action of the initial decision relating to continued operation of the 19.2-mile Minnesota line segment would be affected materially if the material error identified in this appeal were corrected. Moreover, it has been shown that such action involves a matter of general transportation importance relating to the appropriate considera-

tion of opportunity cost in rail abandonment cases. Upon either or both of those criteria, the Commission should determine to hear this appeal. 49 CFR §§ 1121.36(e)(2)(i) and (ii) (interim). Upon consideration of this appeal, a decision should be entered denying abandonment of such Minnesota line segment. Protestants, Minnesota Shippers Group, respectfully so pray.

Respectfully submitted,

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FARMERS COOPERATIVE OIL ASSOCIATION
HAYFIELD DEVELOPMENT CORPORATION
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August 4, 1981

CERTIFICATE OF SERVICE

I hereby certify that I have, this 4th day of August, 1981, served a copy of the foregoing appeal upon all parties of record by first-class mail, postage prepaid.

Thomas F. McFarland Jr.
Thomas F. McFarland, Jr.

EC

SERVICE DATE
OCT 9 1981
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OCT 15 1981
LAW DEPARTMENT
C&NW TRANSP. CO.

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-1 (Sub-No. 113F)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: October 7, 1981

By decision served July 15, 1981, Administrative Law Judge (ALJ) Paul J. Cierman, approved the application of Chicago and North Western Transportation Company (CNW) for authority to abandon 144.8 miles of rail line in Fayette, Bremer, Chickasaw, Howard, and Mitchell Counties, IA and Mower, Dodge, Goodhire, Rice, and Dakota Counties, MN.

Protestants Brownsdale Cooperative Association, Century Plastics, Inc., Farmers Cooperation Oil Association, Hayfield Development Cooperation, Hayfield Lumber Company, Huntting Elevator Company, Inc., Midland Cooperatives, Inc., Mower County Service Company, Nelson's Gas, Inc., Power Span, Inc., Reese Farm Center, Inc., and Sargeant Grain Company (the Minnesota Shippers Group) filed a joint appeal to a portion of the initial decision. Their joint appeal is limited to issues concerning the abandonment of 19.2 miles of CNW's trackage between Dodge Center and Sargeant, MN (Milepost Nos. 442.0-457.2) and between Hayfield and Waltham, MN (Milepost Nos. 1.2-5.2). CNW has responded to the Minnesota Shippers Group's appeal.

CNW has also filed petitions requesting the immediate issuance of a partial abandonment certificate and the modification of certain conditions imposed in the initial decision. No party responded to CNW's petitions.

Additionally, in letters dated August 17, 1981, and September 1 and 3, 1981, the Railway Labor Executives Association (RLEA), the Brotherhood of Locomotive Engineers (BLE), and the United Transportation Union (UTU), respectively,

seek to file "protests" pursuant to 49 U.S.C. §10904(b), to CNW's request that a partial certificate be issued.

The issues raised in these various pleadings will be discussed in turn.

Abandonment of the Dodge Center - Sargeant and Hayfield - Waltham Segment.

As indicated above, the Minnesota Shippers Group's appeal is limited to issues concerning the abandonment of a 19.2 mile segment of this line. It argues that: (1) the ALJ improperly based his decision on opportunity costs exclusively; and (2) the ALJ failed to recognize the profitability of this segment as demonstrated by applicant's own evidence of revenues and costs.

The burden of proof in abandonment proceedings is well settled. Applicants have the burden of showing that the public convenience and necessity permit abandonment of the entire line. Protestants have the burden of demonstrating that the retention of a portion of the line is required by the public convenience and necessity. Cooperative Legislative Committee v. I.C.C., No. 78-3477, 6th Cir., Order filed September 30, 1980, p. 3; State of ME Dept. of Transp. v. I.C.C., 587 F. 2d 541, 543 (1st Cir. 1978); Village of Candor v. United States, 151 F. Supp. 889, 892 (D.N.Y. 1957). In determining whether the present or future public convenience and necessity require or permit an abandonment, the burden on the applicant from the continued operation of the line must be weighed against the need for service and harm to affected shippers and communities from abandonment. Colorado v. United States, 271 U.S. 153 (1926).

In this proceeding, the ALJ properly recognized the various parties' respective burdens of proof, and carefully balanced the relevant evidence of record in reaching his ultimate conclusion.

Although sizeable opportunity costs played a significant part in the ALJ's determination that abandonment of the entire

line is justified, it cannot be said that they were the sole basis for his conclusion. CNW clearly demonstrated that the operation of the entire line is unprofitable and unduly burdensome on the railroad and interstate commerce. Applicant properly excluded the revenue derived from, and the expenses associated with, overhead traffic on this line in its determination of the line's earning capacity. Exercising proper managerial discretion, applicant has determined that overhead traffic formerly moving over this line will be diverted to other lines for reasons of economy and efficiency. Consequently, when considering only that traffic originating and terminating on the line, and the expenses incident to such traffic, we find that CNW has operated this line at a loss in recent years. In the base year (operations for the 12 months ended July 31, 1980), applicant incurred an avoidable loss of $174,266 from operations. This figure, coupled with sizeable opportunity costs,[1]/ serves to demonstrate the burden continued operation of the entire line would impose on applicant and interstate commerce. It should be noted that these entire line figures are not contested on appeal.

Weighed against this burden on applicant and interstate commerce are the effects of abandonment on rural and community development in the area, and on shippers and receivers located on the line. The ALJ pointed out that there was no evidence developed that abandonment of the line would have a significant adverse impact on rural or community development. In fact, he noted, one protesting community-- Hayfield, MN --has been able to attract new businesses despite the prospect of abandonment.

1/ In applying the 9.3 percent pretax cost of capital figure developed in Texas and Pacific Railway Company- Abandonment, 363 I.C.C. 666 (1980), and found to be applicable to the industry generally in Illinois Central Gulf R. Co. - Abandonment, 363 I.C.C. 729 (1980), to the net liquidation value of applicant's concerned property ($10,926,785), we arrive at an opportunity cost of $1,016,191. The net liquidation value used in this computation was developed by protestant Iowa Department of Transportation.

Admittedly, shippers and receivers on the line will be seriously impacted by this abandonment. The ALJ noted that these parties will suffer some inconvenience and increased transportation costs, but that, on the whole, there is persuasive evidence that adequate alternative sources of transportation will fill the void created by abandonment of this line.

Weighing all these factors in balance, as well as evidence of declining usage of the line by shippers, the speculative nature of future traffic predictions, applicant's marginal financial condition, and the necessity for increased maintenance expenditures on the line, the ALJ reached the justifiable conclusion that applicant met its burden of proof.

The Minnesota Shippers Group has simply failed to establish with any degree of specificity that service could be maintained profitably over the 19.2 mile segment in which they are interested. At hearing, and in its post-hearing brief, applicant has pointed out glaring faults in these protestants' evidence.

Protestants have taken applicant's cost and revenue and attempted to "break out" pertinent data for the 19.2 mile segment. Using this data, as adjusted for alleged inaccuracies, protestants' witness, Mr. George C. Shaffer, concluded that during the base year applicant derived net revenue of $64,872 from operation over the 19.2 mile segment. This figure was reached by subtracting branch costs of $23,802 and off-branch costs of $73,769 from revenue of $162,443. Applicant takes specific exception to this computation in only one respect. In determining on-branch costs, Mr. Shaffer developed a maintenance-of-way (M-O-W) expense of $5,304 ($279 per mile). The witness took the total M-O-W expense attributable to the entire 144.8 miles of rail line and simply apportioned it on the basis of mileage. In this manner, the witness arrived at a

$40,301 M-O-E expense for the 19.2 mile of track, and he then further apportioned that figure on the basis of the gross tons of protestants' traffic. We agree with applicant that this method significantly underestimates the M-O-W expense. An appropriate level of maintenance cannot be sustained on the basis of a $279 per mile expenditure. As applicant points out, if this segment of track is maintained, shippers and receivers on the line would have to pay the entire M-O-W expense, not just an apportionment based on tonnage; that is, using Mr. Shaffer's computations, a M-O-W expense of $40,301. Assuming protestants' other calculations are correct, this would mean that a profit of $29,875 was garnered from operations on this 19.2 mile segment during the base year. Moreover, this marginal "profit" does not take into consideration the significant opportunity costs CNW incurred on this segment, which, by protestants' own calculations, amount to $161,806.

Further, protestants fail to establish future profitability with any measure of certainty. In the circumstances present, where protestants seek continuation of service on only a small segment of a line being abandoned, past operations and expenses have very little relationship to the future.

Protestants failed to provide a complete operating plan for future service on the segment, and failed to quantify the costs for any such plan. Witness Shaffer admitted that his optimistic estimates of future traffic increases were based on unproven assertions of his shipper clients (transcript p. 581). No documentary evidence was presented to substantiate the predictions of increased business. Moreover, he acknowledged that he did not know how much money it would take to maintain this line segment in the future (transcript p. 595), and that his computations did not prove that the segment could be retained profitably.

In these premises, we agree with the ALJ that protestants have failed to satisfy their burden of proving the viability of their partial abandonment proposal.

We conclude that the appeal of the Minnesota Shippers Group should be denied, because the decision of the ALJ is correct in all material respects.

Issuance of a Partial Abandonment Certificate. - CNW has requested the immediate issuance of an abandonment certificate for all trackage involved in this application except the 19.2 mile segment which is the subject of the previously discussed appeal. That segment is also the subject of a subsidy offer filed by the Minnesota Shippers Group under 49 U.S.C. §10905.

An abandonment certificate may be issued only following the issuance of a final decision of the Commission on the merits of the proposal. See 49 U.S.C. §10904(c)(3) and 49 CFR 1121.37(b)(2)(iii). No portion of the initial decision can become final during the pendancy of a discretionary appeal. Therefore, prior to disposition of the Minnesota Shipper Group's appeal, we are precluded from issuing a partial abandonment certificate. As detailed previously, however, we are denying protestants' joint appeal in this decision. Consequently, we believe it is appropriate to issue a partial abandonment certificate in conjunction with this final decision. Because of the pending offer of financial assistance under section 10905 of the Act, however, we cannot issue a certificate covering the 19.2 mile segment of the line being considered for subsidization.

Concerning the ongoing subsidy offer, we have been requested to determine its amount and terms based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line [see 49 U.S.C. §10905(f)(1)]. Our determination will be reached by October 24, 1981. Our decision in this matter will be binding upon the parties unless the sole

offeror in this proceeding withdraws its offer within 10 days. If the offer was to be withdrawn in a timely fashion, we would issue an abandonment certificate for the 19.2 mile segment as expeditiously as practicable. Of course, if our determination is accepted, a certificate would be withheld during the subsidy period.

Modification of Conditions. - CNW has requested that the 120-day public-use condition imposed by the ALJ be modified to permit the removal of the track. We will agree to this proposed modification.

The environmental threshold assessment survey (ETAS) prepared by the Commission's Section of Energy and Environment recommended the imposition of a public use condition because the right-of-way would be suitable as a multipurpose trail for snowmobiling, biking, and hiking. (Generally speaking, the "public use" provisions of 49 U.S.C. §10906 deal with the acquisition of rail properties for other public purposes; and, therefore, no useful purpose is served by requiring an applicant to keep rails and ties in place during the 120-day negotiating period. Consequently, since potential interest in this right-of-way involves the non-rail use of the property, the condition imposed by the ALJ will be amended to permit the removal of rail and ties. Cf. Chicago and North Western Transp. Co. - Abandonment, 354 I.C.C. 735, 740 (1978).

In certain instances, however, prospective purchasers of these properties may intend to acquire them for mass transportation or other public purposes necessitating maintenance of the track (for example, one other such public use would be conversion of the line into a scenic railway). Such a transaction would fall within the public use provisions of section 10906. Upon an affirmative showing that the existing rail line could be used for mass transportation or similar

purposes requiring retention of the track, the public use condition would provide for maintenance of rail and ties. Because the Commisison would need this information at the time it makes its determination as to whether a proposed abandonment would be required or permitted by the present or future public convenience and necessity, the information should be submitted to us within the time provided for filing comments and protests to the proceeding. Thus, information about possible mass transportation use of rail properties proposed for abandonment, requiring maintenance of rail and ties on the right-of-way, must be filed with the Commission.

Letter "protests." - Finally, the three letter "protests" submitted by the Labor interests after the service date of the ALJ's initial decision cannot be accepted. 49 U.S.C. §10904(b) and 49 CFR §1121.36(c)(1) provide that written comments and protests in abandonment proceedings must be filed within 30 days after the application is filed. Consequently, none of these pleadings was tendered in timely fashion.

We note, however, that RLEA and UTU filed identical letter "protests" to CNW's original proposal, within the statutorily allocated time frame. These timely protests have been considered. In RLEA's initial pleading it requested that, in the event of approval of this application, we impose appropriate employee protective conditions. UTU evinced a desire, in its original pleading, to become a party to the protest filed by RLEA. The ALJ imposed the appropriate labor protective conditions, and our certification will be framed accordingly.

This action does not significantly affect either the quality of the human environment or energy conservation.

It is certified:

The present and future public convenience and necessity permits the abandonment by the Chicago and North Western Transportation Company of a portion of its Oelwein, IA - Randolph, MN, rail line, between milepost 496.9 near Randolph, MN, and milepost 459.0 near Dodge Center, MN, and between milepost 442 near Sargeant, MN, and milepost 354.3 near Oelwein, IA, a total distance of 125.6 miles, subject to the conditions for the protection of railroad employees discussed in Oregon Short Line R. Co. - Abandonment Goshen, 360 I.C.C. 91 (1979).

It is ordered:

1. The decision of the Administrative Law Judge, served July 15, 1981, is affirmed, as modified in this decision.

2. CNW's petition requesting the issuance of a partial abandonment certificate is granted to the extent indicated in this decision.

3. CNW's petition seeking modification of a condition imposed by the ALJ in this proceeding is granted.

4. The Minnesota Shipper Group's joint appeal is denied.

5. The late tendered letter "protests" of RLEA, BLE, and UTU are rejected.

6. Subject to the conditions imposed by the ALJ, as modified in this decision, actual abandonment may be affected by CNW after the effective date of this certificate.

7. If the abandonment is effected, tariffs applicable to this line may be canceled upon not less than 10 day's notice to the Commission. When filing schedules cancelling tariffs applicable to that line, CNW shall refer to this certificate and decision by date and docket number.

8. If the authority granted by this certificate and decision is exercised, applicant shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

9. If the authority granted in this certificate and decision is not exercised within one year from the effective date of the certificate, it shall be of no further force and effect.

10. This decision shall be effective on the date it is served and the certificate will be effective 30 days thereafter.

By the Commisison, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

(SEAL)

JAMES H. BAYNE
Acting Secretary

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

RECEIVED
DEC -7 1981
LAW DEPARTMENT
C&NW TRANSP. CO.

BROWNSDALE COOPERATIVE ASSOCIATION; CENTURY PLASTICS, INC.; FARMERS COOPERATIVE OIL ASSOCIATION; HAYFIELD DEVELOPMENT CORPORATION; HAYFIELD LUMBER COMPANY; HUNTTING ELEVATOR COMPANY, INC.; MIDLAND COOPERATIVES, INC.; MOWER COUNTY SERVICE COMPANY; NELSON'S GAS, INC.; POWER SPAN, INC.; REESE FARM CENTER, INC.; and SARGEANT GRAIN COMPANY,

Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

No. 81-2332

PETITION FOR JUDICIAL REVIEW OF A DECISION
OF THE INTERSTATE COMMERCE COMMISSION

Brownsdale Cooperative Association, et al., petitioners, hereby petition for judicial review of the Certificate and Decision of the Interstate Commerce Commission in its Docket No. AB-1 (Sub-No. 113F), Chicago and North Western Transportation Company - Abandonment between Oelwein, IA and Randolph, MN, decided October 7, 1981, served October 9, 1981 (not printed), copy attached as Appendix A, insofar as such decision authorized abandonment of 19.2 miles of railroad line between Dodge Center and Sargeant, MN, and between Hayfield and Waltham, MN.

This Court has jurisdiction pursuant to 28 USC §§ 2321(a), 2342(5) and 2344. Venue lies in this Court in that the principal offices of all petitioners are located in this Circuit. 28 USC § 2343.

THOMAS F. McFARLAND, JR.
Belnap, McCarthy, Spencer,
Sweeney & Harkaway
20 North Wacker Drive
Chicago, Illinois 60606
(312) 236-0204

MICHAEL P. CASEY
Evans, Hoemeke, Casey & Daly
One Mercantile Tower, Suite 3216
St. Louis, Missouri 63101
(314) 231-2792

Attorneys for Petitioners

December 7, 1981

EC

SERVICE DATE
OCT 9 1981

INTERSTATE COMMERCE COMMISSION

CERTIFICATE AND DECISION

Docket No. AB-1 (Sub-No. 113F)

RECEIVED
OCT 19 1981
DELIVER, MSC, S, S & H.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY--
ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: October 7, 1981

By decision served July 15, 1981, Administrative Law Judge (ALJ) Paul J. Cierman, approved the application of Chicago and North Western Transportation Company (CNW) for authority to abandon 144.8 miles of rail line in Fayette, Bremer, Chickasaw, Howard, and Mitchell Counties, IA and Mower, Dodge, Goodhire, Rice, and Dakota Counties, MN.

Protestants Brownsdale Cooperative Association, Century Plastics, Inc., Farmers Cooperation Oil Association, Hayfield Development Cooperation, Hayfield Lumber Company, Huntting Elevator Company, Inc., Midland Cooperatives, Inc., Mower County Service Company, Nelson's Gas, Inc., Power Span, Inc., Reese Farm Center, Inc., and Sargeant Grain Company (the Minnesota Shippers Group) filed a joint appeal to a portion of the initial decision. Their joint appeal is limited to issues concerning the abandonment of 19.2 miles of CNW's trackage between Dodge Center and Sargeant, MN (Milepost Nos. 442.0-457.2) and between Hayfield and Waltham, MN (Milepost Nos. 1.2-5.2). CNW has responded to the Minnesota Shippers Group's appeal.

CNW has also filed petitions requesting the immediate issuance of a partial abandonment certificate and the modification of certain conditions imposed in the initial decision. No party responded to CNW's petitions.

Additionally, in letters dated August 17, 1981, and September 1 and 3, 1981, the Railway Labor Executives Association (RLEA), the Brotherhood of Locomotive Engineers (BLE), and the United Transportation Union (UTU), respectively,

seek to file "protests" pursuant to 49 U.S.C. §10904(b), to CNW's request that a partial certificate be issued.

The issues raised in these various pleadings will be discussed in turn.

Abandonment of the Dodge Center - Sargeant and Hayfield - Waltham Segment.

As indicated above, the Minnesota Shippers Group's appeal is limited to issues concerning the abandonment of a 19.2 mile segment of this line. It argues that: (1) the ALJ improperly based his decision on opportunity costs exclusively; and (2) the ALJ failed to recognize the profitability of this segment as demonstrated by applicant's own evidence of revenues and costs.

The burden of proof in abandonment proceedings is well settled. Applicants have the burden of showing that the public convenience and necessity permit abandonment of the entire line. Protestants have the burden of demonstrating that the retention of a portion of the line is required by the public convenience and necessity. Cooperative Legislative Committee v. I.C.C., No. 78-3477, 6th Cir., Order filed September 30, 1980, p. 3; State of ME Dept. of Transp. v. I.C.C., 587 F. 2d 541, 543 (1st Cir. 1978); Village of Candor v. United States, 151 F. Supp. 889, 892 (D.N.Y. 1957). In determining whether the present or future public convenience and necessity require or permit an abandonment, the burden on the applicant from the continued operation of the line must be weighed against the need for service and harm to affected shippers and communities from abandonment. Colorado v. United States, 271 U.S. 153 (1926).

In this proceeding, the ALJ properly recognized the various parties' respective burdens of proof, and carefully balanced the relevant evidence of record in reaching his ultimate conclusion.

Although sizeable opportunity costs played a significant part in the ALJ's determination that abandonment of the entire

line is justified, it cannot be said that they were the sole basis for his conclusion. CNW clearly demonstrated that the operation of the entire line is unprofitable and unduly burdensome on the railroad and interstate commerce. Applicant properly excluded the revenue derived from, and the expenses associated with, overhead traffic on this line in its determination of the line's earning capacity. Exercising proper managerial discretion, applicant has determined that overhead traffic formerly moving over this line will be diverted to other lines for reasons of economy and efficiency. Consequently, when considering only that traffic originating and terminating on the line, and the expenses incident to such traffic, we find that CNW has operated this line at a loss in recent years. In the base year (operations for the 12 months ended July 31, 1980), applicant incurred an avoidable loss of $174,266 from operations. This figure, coupled with sizeable opportunity costs,[1/] serves to demonstrate the burden continued operation of the entire line would impose on applicant and interstate commerce. It should be noted that these entire line figures are not contested on appeal.

Weighed against this burden on applicant and interstate commerce are the effects of abandonment on rural and community development in the area, and on shippers and receivers located on the line. The ALJ pointed out that there was no evidence developed that abandonment of the line would have a significant adverse impact on rural or community development. In fact, he noted, one protesting community-- Hayfield, MN --has been able to attract new businesses despite the prospect of abandonment.

1/ In applying the 9.3 percent pretax cost of capital figure developed in Texas and Pacific Railway Company- Abandonment, 363 I.C.C. 666 (1980), and found to be applicable to the industry generally in Illinois Central Gulf R. Co. - Abandonment, 363 I.C.C. 729 (1980), to the net liquidation value of applicant's concerned property ($10,926,785), we arrive at an opportunity cost of $1,016,191. The net liquidation value used in this computation was developed by protestant Iowa Department of Transportation.

Admittedly, shippers and receivers on the line will be seriously impacted by this abandonment. The ALJ noted that these parties will suffer some inconvenience and increased transportation costs, but that, on the whole, there is persuasive evidence that adequate alternative sources of transportation will fill the void created by abandonment of this line.

Weighing all these factors in balance, as well as evidence of declining usage of the line by shippers, the speculative nature of future traffic predictions, applicant's marginal financial condition, and the necessity for increased maintenance expenditures on the line, the ALJ reached the justifiable conclusion that applicant met its burden of proof.

The Minnesota Shippers Group has simply failed to establish with any degree of specificity that service could be maintained profitably over the 19.2 mile segment in which they are interested. At hearing, and in its post-hearing brief, applicant has pointed out glaring faults in these protestants' evidence.

Protestants have taken applicant's cost and revenue and attempted to "break out" pertinent data for the 19.2 mile segment. Using this data, as adjusted for alleged inaccuracies, protestants' witness, Mr. George C. Shaffer, concluded that during the base year applicant derived net revenue of $64,872 from operation over the 19.2 mile segment. This figure was reached by subtracting branch costs of $23,802 and off-branch costs of $73,769 from revenue of $162,443. Applicant takes specific exception to this computation in only one respect. In determining on-branch costs, Mr. Shaffer developed a maintenance-of-way (M-O-W) expense of $5,304 ($279 per mile). The witness took the total M-O-W expense attributable to the entire 144.8 miles of rail line and simply apportioned it on the basis of mileage. In this manner, the witness arrived at a

$40,301 M-O-E expense for the 19.2 mile of track, and he then further apportioned that figure on the basis of the gross tons of protestants' traffic. We agree with applicant that this method significantly underestimates the M-O-W expense. An appropriate level of maintenance cannot be sustained on the basis of a $279 per mile expenditure. As applicant points out, if this segment of track is maintained, shippers and receivers on the line would have to pay the entire M-O-W expense, not just an apportionment based on tonnage; that is, using Mr. Shaffer's computations, a M-O-W expense of $40,301. Assuming protestants' other calculations are correct, this would mean that a profit of $29,875 was garnered from operations on this 19.2 mile segment during the base year. Moreover, this marginal "profit" does not take into consideration the significant opportunity costs CNW incurred on this segment, which, by protestants' own calculations, amount to $161,806.

Further, protestants fail to establish future profitability with any measure of certainty. In the circumstances present, where protestants seek continuation of service on only a small segment of a line being abandoned, past operations and expenses have very little relationship to the future.

Protestants failed to provide a complete operating plan for future service on the segment, and failed to quantify the costs for any such plan. Witness Shaffer admitted that his optimistic estimates of future traffic increases were based on unproven assertions of his shipper clients (transcript p. 581). No documentary evidence was presented to substantiate the predictions of increased business. Moreover, he acknowledged that he did not know how much money it would take to maintain this line segment in the future (transcript p. 595), and that his computations did not prove that the segment could be retained profitably.

In these premises, we agree with the ALJ that protestants have failed to satisfy their burden of proving the viability of their partial abandonment proposal.

We conclude that the appeal of the Minnesota Shippers Group should be denied, because the decision of the ALJ is correct in all material respects.

Issuance of a Partial Abandonment Certificate. - CNW has requested the immediate issuance of an abandonment certificate for all trackage involved in this application except the 19.2 mile segment which is the subject of the previously discussed appeal. That segment is also the subject of a subsidy offer filed by the Minnesota Shippers Group under 49 U.S.C. §10905.

An abandonment certificate may be issued only following the issuance of a final decision of the Commission on the merits of the proposal. See 49 U.S.C. §10904(c)(3) and 49 CFR 1121.37(b)(2)(iii). No portion of the initial decision can become final during the pendancy of a discretionary appeal. Therefore, prior to disposition of the Minnesota Shipper Group's appeal, we are precluded from issuing a partial abandonment certificate. As detailed previously, however, we are denying protestants' joint appeal in this decision. Consequently, we believe it is appropriate to issue a partial abandonment certificate in conjunction with this final decision. Because of the pending offer of financial assistance under section 10905 of the Act, however, we cannot issue a certificate covering the 19.2 mile segment of the line being considered for subsidization.

Concerning the ongoing subsidy offer, we have been requested to determine its amount and terms based on the avoidable cost of providing continued rail transportation, plus a reasonable return on the value of the line [see 49 U.S.C. §10905(f)(1)]. Our determination will be reached by October 24, 1981. Our decision in this matter will be binding upon the parties unless the sole

offeror in this proceeding withdraws its offer within 10 days. If the offer was to be withdrawn in a timely fashion, we would issue an abandonment certificate for the 19.2 mile segment as expeditiously as practicable. Of course, if our determination is accepted, a certificate would be withheld during the subsidy period.

Modification of Conditions. - CNW has requested that the 120-day public use condition imposed by the ALJ be modified to permit the removal of the track. We will agree to this proposed modification.

The environmental threshold assessment survey (ETAS) prepared by the Commission's Section of Energy and Environment recommended the imposition of a public use condition because the right-of-way would be suitable as a multipurpose trail for snowmobiling, biking, and hiking. Generally speaking, the "public use" provisions of 49 U.S.C. §10906 deal with the acquisition of rail properties for other public purposes; and, therefore, no useful purpose is served by requiring an applicant to keep rails and ties in place during the 120-day negotiating period. Consequently, since potential interest in this right-of-way involves the non-rail use of the property, the condition imposed by the ALJ will be amended to permit the removal of rail and ties. Cf. Chicago and North Western Transp. Co. - Abandonment, 354 I.C.C. 735, 740 (1978).

In certain instances, however, prospective purchasers of these properties may intend to acquire them for mass transportation or other public purposes necessitating maintenance of the track (for example, one other such public use would be conversion of the line into a scenic railway). Such a transaction would fall within the public use provisions of section 10906. Upon an affirmative showing that the existing rail line could be used for mass transportation or similar

purposes requiring retention of the track, the public use condition would provide for maintenance of rail and ties. Because the Commisison would need this information at the time it makes its determination as to whether a proposed abandonment would be required or permitted by the present or future public convenience and necessity, the information should be submitted to us within the time provided for filing comments and protests to the proceeding. Thus, information about possible mass transportation use of rail properties proposed for abandonment, requiring maintenance of rail and ties on the right-of-way, must be filed with the Commission.

Letter "protests." - Finally, the three letter "protests" submitted by the Labor interests after the service date of the ALJ's initial decision cannot be accepted. 49 U.S.C. §10904(b) and 49 CFR §1121.36(c)(1) provide that written comments and protests in abandonment proceedings must be filed within 30 days after the application is filed. Consequently, none of these pleadings was tendered in timely fashion.

We note, however, that RLEA and UTU filed identical letter "protests" to CNW's original proposal, within the statutorily allocated time frame. These timely protests have been considered. In RLEA's initial pleading it requested that, in the event of approval of this application, we impose appropriate employee protective conditions. UTU evinced a desire, in its original pleading, to become a party to the protest filed by RLEA. The ALJ imposed the appropriate labor protective conditions, and our certification will be framed accordingly.

This action does not significantly affect either the quality of the human environment or energy conservation.

It is certified:

The present and future public convenience and necessity permits the abandonment by the Chicago and North Western Transportation Company of a portion of its Oelwein, IA - Randolph, MN, rail line, between milepost 496.9 near Randolph, MN, and milepost 459.0 near Dodge Center, MN, and between milepost 442 near Sargeant, MN, and milepost 354.3 near Oelwein, IA, a total distance of 125.6 miles, subject to the conditions for the protection of railroad employees discussed in Oregon Short Line R. Co. - Abandonment Goshen, 360 I.C.C. 91 (1979).

It is ordered:

1. The decision of the Administrative Law Judge, served July 15, 1981, is affirmed, as modified in this decision.

2. CNW's petition requesting the issuance of a partial abandonment certificate is granted to the extent indicated in this decision.

3. CNW's petition seeking modification of a condition imposed by the ALJ in this proceeding is granted.

4. The Minnesota Shipper Group's joint appeal is denied.

5. The late tendered letter "protests" of RLEA, BLE, and UTU are rejected.

6. Subject to the conditions imposed by the ALJ, as modified in this decision, actual abandonment may be affected by CNW after the effective date of this certificate.

7. If the abandonment is effected, tariffs applicable to this line may be canceled upon not less than 10 day's notice to the Commission. When filing schedules cancelling tariffs applicable to that line, CNW shall refer to this certificate and decision by date and docket number.

8. If the authority granted by this certificate and decision is exercised, applicant shall advise this Commission in writing, immediately after abandonment of the line of railroad, of the date on which the abandonment actually took place.

9. If the authority granted in this certificate and decision is not exercised within one year from the effective date of the certificate, it shall be of no further force and effect.

10. This decision shall be effective on the date it is served and the certificate will be effective 30 days thereafter.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam.

JAMES H. BAYNE
Acting Secretary

(SEAL)

PROOF OF SERVICE

I hereby certify that I have, this 7th day of December, 1981, served two copies of the foregoing petition upon all parties of record in the Interstate Commerce Commission proceeding by first-class mail, postage prepaid, and upon respondents in the following manner:

Office of the General Counsel
Interstate Commerce Commission
Washington, D. C. 20423

United States Department of Justice
Appellate Section
Washington, D. C. 20530

Thomas F. McFarland, Jr.

CO

SERVICE DATE
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RECEIVED
DEC 18 1981
LAW DEPARTMENT
C&NW TRANSP. CO.

INTERSTATE COMMERCE COMMISSION

Docket No. AB-1 (Sub-No. 113P)

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
ABANDONMENT BETWEEN OELWEIN, IA AND RANDOLPH, MN

Decided: December 14, 1981

By petition jointly filed December 7, 1981, certain protestants[1]/ seek to stay the effective date of the abandonment certificate pending judical review. The certificate was served November 17, 1981, to take effect on December 17, 1981. A review of petitioners arguments leads me to conclude that they have not presented justification for a stay in conformity with the criteria for granting stay requests delineated in Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F. 2d 841 (D.C. Cir. 1977).

First of all, I do not find that petitioners have presented a substantial case and are, therefore, likely to prevail before the court. In addition, petitioners have not raised a serious legal question. Essentially, they raise the same argument concerning profitability of the line which was rejected in the initial decision and on appeal. In its decision served October 9, 1981, the Commission found that, using protestants' figures, the 19.2 mile line segment showed only a marginal profit of $29,875. This figure does not take into consideration the significant opportunity costs Chicago and North Western Transportation Company (CNW) incurred on the line, which by protestants' own calculations, amount to $161,806.

The opportunity cost methodology used here and in all recent abandonment proceedings is well established. In fact, petitioners do not challenge the opportunity cost calculations. Thus, petitioners do not challenge the calculations which form the basis for granting the abandonment. Under established precedent in abandonment proceedings, the contentions concerning the marginal and future profitability of the line are without merit, and do not even raise a serious legal question.

1/ Brownsdale Cooperative Association, Century Plastics, Inc., Farmers Cooperation Oil Association, Hayfield Development Corporation, Hayfield Lumber Company, Huntng Elevator Company, Inc., Midland Cooperatives, Inc., Mower County Service Company, Nelson's Gas, Inc., Power Span, Inc., Reese Farm Center, Inc., and Sargeant Grain Company.

Petitioners also allege that they will be irreparably harmed if the stay is not granted. However, the Administrative Law Judge concluded that the area has adequate motor carrier, barge and rail transportation alternatives available. While shippers on the line may experience increased transportation costs, it can not be concluded that they would suffer irreparable harm.

I also reject petitioners' contention that grant of the stay will not harm CNW. As noted above, CNW is operating a marginal line and is incurring a substantial opportunity cost and a grant of this stay would cause applicant to continue to incur this cost.

Finally, petitioners cite certain decisions of the courts of appeals granting stays pending judicial review. In response to this, I would note that the courts continue to deny stays where appropriate.[2/]

In conclusion, I find that it would be contrary to the public interest to require CNW to continue operations over the line until judicial review is completed.

It is ordered:

1. The petition for stay is denied.

2. This decision shall become effective on the date it is served.

By the Commission, Reese H. Taylor, Jr., Chairman.

Agatha L. Mergenovich
Secretary

(SEAL)

2/ Mississippi Public Service Commission, et al v. Interstate Commerce Commission and United States, No. 81-4407, Fifth Circuit, temporary stay entered November 6, 1981, stay dissolved November 19, 1981; and People of the State of Illinois, et al v. Interstate Commerce Commission and United States, Nos. 81-2520 et al., Seventh Circuit, stay denied October 29, 1981; stay denied by Circuit Justice Stevens December 1, 1981.